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LAW OF MERCHANT SHIPPING;

With an Appendix

CONTAINING

**ALL THE STATUTES, ORDERS IN COUNCIL AND FORMS
OF PRACTICAL UTILITY.**

BY

FREDERIC PHILIP MAUDE

AND

CHARLES EDWARD POLLOCK,

ESQUIRES, OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

FOURTH EDITION

BY

THE HON. BARON POLLOCK,

ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT OF JUSTICE,

AND

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OF THE MIDDLE TEMPLE, ESQ.,

*Her Majesty's Solicitor-General for the County Palatine of Durham,
and Recorder of Bradford.*

IN TWO VOLUMES.

Vol. I.

LONDON:

HENRY SWEET, 3, CHANCERY LANE,
Law Publisher.

1881.

LONDON :

G. F. ROWORTH, PRINTER, BREAM'S BUILDINGS, CHANCERY LANE.

To the Memory

OF THE LATE

FREDERIC PHILIP MAUDE,

This Edition

IS

DEDICATED

BY

The Present Editors.

PREFACE.

THE First Edition of this work was published in 1853. It formed the labour of two young barristers, who were intimately connected both by private and professional friendship, at a time when business either in Court or Chambers had scarcely begun to find them occupation. The Chapters were composed for the most part alternately by one of the Authors, and were settled by both in conference.

Those who remember the late Mr. Frederic P. Maude and his earlier writings know what was likely to be the character of his work. His clear style, accurate expression and fine appreciation of nice distinctions, all evidenced a mind which, having amply enjoyed classics, ancient and modern, brought accomplishments of no mean order to the study and elucidation of English law. His pen never failed to produce in a form, as pleasing as the subject would admit of, a result thorough and reliable.

The book was very favourably received by the Profession, and by others interested in the law relating to Merchant Shipping; and in 1861 a Second Edition was called for, which was followed by a Third in 1864.

In 1870, the Authors had made great progress in the preparation of a new Edition. Its completion was, however, stayed by the death of Mr. Maude, and other causes. It was not till five or six years later that the work was taken up anew by the surviving Author and Mr. Gainsford Bruce, who had been an intimate friend of Mr. Maude.

If the Editors had foreseen the delay that arose in the preparation of the present Edition, which has been more than two years in the press, they would have hesitated to undertake the task ; and they still look with dissatisfaction at some portions of the book which have been wholly or in part re-written since the First Edition appeared, and which involving as they do the consideration of so many decisions of our Courts, together with an increasing mass of Statutes and Orders in Council, have presented difficulties of arrangement which rendered it impossible for the Editors to make their work either so concise or orderly as they could have desired. It was considered, however, better to sacrifice style rather than substance, and to present in detail the results of Statutes and decisions, rather than to state general propositions, which are of but little use to the practical lawyer.

The Editors desire to acknowledge the great assistance which they have received from Mr. Charles Fuhr Jemmett, B.C.L., of the Inner Temple and Lincoln's Inn, who, besides rendering constant help in revising the MS. and proofs, has prepared the Pilotage Tables and the Indexes ; and also from Sir P. Benson Maxwell, who, as an old friend of the original Authors, bestowed upon the work, while in MS., many valuable criticisms.

To Mr. Douglas Forster, formerly of the Northern Circuit, now of Cape Town, South Africa, the Editors are indebted for valuable help at the commencement of their labours in preparing the MS. for the press.

The Editors have further to express their thanks for assistance rendered them during the progress of the book as well by the Admiralty Office, the Foreign Office, the Board of Trade, the Commissioners of Customs, the Privy Council Office and other public departments, as by the Secretary of the Trinity House of Deptford Strond, the Secretaries of the Trinity Houses of

Newcastle and Hull and other pilotage authorities in England and Wales.

The Table of Cases has been prepared by Mr. Herbert C. Pollock, M.A., of the Inner Temple.

The Appendix has increased to an unexpected bulk ; but as the work advanced the Editors became convinced that a complete compilation of Statutes and Orders in Council relating to Merchant Shipping would form a most useful addition to it. From 1854 to 1880 there has been a succession of Acts of Parliament relating to Merchant Shipping or Merchant Seamen. Only in the years 1857, 1858 and 1860 was this branch of the law left unaltered. Not a few of the later provisions are hard to reconcile with earlier ones left unrepealed, and the whole series constitutes a legislative labyrinth of recent growth without precedent in any other branch of the law.

Another source of complexity arises from the existence of a multitude of Orders in Council relating to Merchant Shipping which have the force of Acts of Parliament, and are not ordinarily to be found except in the columns of the Gazette. These Orders in Council, with the exception of a few of minor importance, are included in the Appendix.

A full Index has been added to the Appendix, and it is hoped that this the first attempt that has ever been made to present in one volume the text of all important provisions having the force of law relating to Merchant Shipping in such a form as to be easily referred to, will be found to be of service, not only to the legal profession but to consuls at foreign ports, to commanders of Queen's ships, as well as to shipowners and others concerned in shipping.

The Pilotage Tables in the Appendix contain much information compressed into a very small space.

The Ancient Maritime Laws of Europe, when referred to, are cited, as in the earlier editions, from the text, and according to the divisions adopted by M. Pardessus in his "Collection de Lois Maritimes, Paris, 1828."

The Editions of the Text Books by English and American writers which are referred to are as follows :—

- Molloy de Jure Maritimo, 9th Edit. *London.* 1769.
 Beawes' Lex Mercatoria, by Chitty. *London.* 1813.
 Kent's Commentaries on American Law. *New York.* 1873.
 Holt on Shipping, 2nd Edit. *London.* 1824.
 Abbott on Shipping, 5th Edit. *London.* 1827.
 American Edition, by Story and Perkins.
 Boston. 1846.
 Wilkinson on Shipping. *London.* 1843.
 Park on Insurance, 7th Edit. *London.* 1817.
 Phillips on Insurance, 3rd Edit. *Boston.* 1853.
 Duer on Insurance. *New York.* 1845. (Vol. 2, 1846.)
 Arnould on Insurance, 2nd Edit. *London.* 1857.
 Benecké's Principles of Indemnity in Marine Assurance.
 London. 1824.
 Stevens on Average, 5th Edit. *London.* 1835.

PREFACE

TO THE FIRST EDITION.



THE object of the Writers of this Book has been to provide a Compendium of the Law relating to Merchant Shipping in as small a compass as is consistent with the importance and extent of the subject. The plan adopted has been to confine the text of the Work to the Law of England as it now exists, whether it depend upon statutory enactment or upon the decisions of the Courts of this country; reserving for the notes such remarks upon our own earlier law, and such notices of the laws of foreign countries, as have appeared directly to explain the principles of the existing law.

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ADDENDA ET CORRIGENDA.

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- 44, note (u)—Add *Bathany v. Bouch*, 29 W. R. 665 (Q. B. D.).
- 60, note (r)—See also *The Fanchon*, 5 P. D. 173.
- 81, note (t)—*Chapman v. The Royal Netherlands Steam Co.* is now reported, 4 P. D. 157.
- 87, note (l)—Add *Frazer v. Cuthbertson*, 6 Q. B. D. 93.
- 96, note (a)—See *Ex parte Willoughby, In re Westlake*, 16 Ch. D. 604, as to what is sufficient possession to entitle a material man to a possessory lien for necessaries.
- 103, note (r)—See *The Tulca*, 5 P. D. 169.
- 107—Nine lines from bottom, for "assignees" read trustee.
- 146, note (z)—For 33 L. J., N. S. 286, read 33 L. T., N. S. 286.
- 171—The Merchant Seamen Act, 1880, s. 7, provides for the grant by the Registrar General of Shipping and Seamen of certificates of service to seamen entitled to the rating of A. B.'s. See Appendix, p. cccxxd.
- 172—The Merchant Seamen Act, 1880, s. 9, enables the sanitary authority of any seaport town to provide by bye-law for the licensing and regulation of seamen's lodging-houses. See Appendix, p. cccxxd.
- 173, note (a)—The provisions in the text are extended by the Merchant Seamen Act, 1880, ss. 5, 6. See Appendix, p. cccxxc.
- 291, note (f)—*Nelson v. Dahl* is now reported on appeal, 5 App. Ca. 38.
- 320, note (f)—*The Alhambra* has been reversed on appeal, and is reported, 6 P. D. 68 (C. A.).
- 348, note (s)—See also *Anderson v. Morice*, 1 App. Ca. 713.
- 359, note (h)—*Glyn v. The East India Dock Co.* has been reversed on appeal, and is reported on appeal, 6 Q. B. D. 475.
- 406, note (e)—*Nelson v. Dahl* has been affirmed on appeal to the House of Lords, and the appeal is reported, 6 App. Ca. 38.
- 411, note (f)—Add "As to when, in calculating the demurrage due, the days for loading and discharging are to be kept separate, see *Marshall v. Bolckow, Vaughan & Co.*, 6 Q. B. D. 231."
- 429, note (k)—See also *Sir John Pirie and Co. v. The Middle Dock Co.*, Times Newspaper April, 6, 1881.
- 433, note (b) } —See *Wright v. Marwood*, 7 Q. B. D. 62 (C. A.), where it was held, in a
488, note (f) } case of jettison of cattle carried on deck, that the owners of the cattle
were not entitled to average against the shipowner.
- 461, note (u)—See *Bradford v. Symondson*, Weekly Notes for 1881, p. 63, as to the premium on a re-insurance being payable, notwithstanding that at the time that the re-insurance had been effected the vessel re-insured had arrived in safety.
- 480, note (v)—See also *The Mercantile Marine Steamship Co. v. Tyser*, 7 Q. B. D. 73.
- 488, note (l)—See *supra*, 433, note (b).
- 522, note (m)—See also *The Mercantile Marine Steamship Co. v. Tyser*, 7 Q. B. D. 73, where the withholding from the underwriters information that the vessel was chartered under a charter-party, containing a power to cancel, was held a concealment vitiating a policy on freight.
- 527, note (f)—*Burnand v. Rodocanachi* is now reported on appeal, 6 Q. B. 638.
- 534, note (n)—See also *The Inman Steamship Co. v. Bischoff*, 6 Q. B. D. 648.
- 614, note (a)—See also *Spaight v. Tedcastle*, 6 App. Ca. 217.
- 622, note (h)—As to the law which governs the liability of foreign vessels proceeded against in the Admiralty Division for damage done on the high seas, see *The Leon*, Weekly Notes for 1881, p. 82.
- 652, note (s)—Add "But a foreign national vessel can no more be arrested in a salvage action in rem than in any other action in rem, *The Constitution*, 4 P. D. 39."

THE LAW OF MERCHANT SHIPPING.

CHAPTER I.

TITLE TO AND NATIONAL CHARACTER OF MERCHANT SHIPS.

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It is not intended to confine this chapter wholly to the consideration of the law relating to British ships, but as these vessels form by far the most important portion of the shipping in

BRITISH
SHIPS.

our ports, it will be convenient to direct special attention to them.

The expression "British ship" means a ship belonging to persons entitled to own British ships, and registered according to existing law.

It will be necessary to consider this subject, *first*, as it relates to registry, and *secondly*, as it relates to navigation, and it will be found that by far the greater part of the earlier law has been repealed by recent statutes, and that the peculiar and exclusive privileges formerly conferred upon British ships have been almost entirely taken away (a).

REGISTRY.

Ships.

First, with respect to registry. Formerly a register was not required as expressive of a British ship's national character; nor was registration compulsory upon owners; the effect of the Registration Acts being merely that no ships, unless registered, were entitled to the privileges of British ships (b). The principal acts at present in force for regulating the registry of ships are the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104 (c)); the Merchant Shipping Act Amendment Act, 1855 (18 & 19 Vict. c. 91); the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63); the Merchant Shipping Act, 1871 (34 & 35 Vict. c. 110); the Merchant Shipping Act, 1872 (35 & 36

(a) For an account of the early history of British shipping, and the legislation affecting it, see the History of Merchant Shipping, by W. S. Lindsay, in 4 vols. 1874—8.

(b) *Le Cheminant v. Pearson*, 4 Taunt. 367. The act 26 Geo. 3, c. 60, seems indeed to have required all those ships to be registered which were entitled to be registered. See *per* Lord Eldon in *Long v. Duff*, 2 B. & P. 215. The first English Navigation Act is the 5 Rich. 2, c. 3, forbidding merchants to bring or carry to or from England in other than "ships of the King's allegiance." The effect of this statute was much diminished by an act which was passed in the next year, 6 Rich. 2, c. 8, and which directed that preference should be given to English ships only if they were "*habiles et sufficientes*." The first act requiring the registry of British ships was the 12 Car. 2, c. 18; but this and the subsequent acts only required that the ships should be owned by persons of this country, and it was not till the 26 Geo. 3, c. 60 (Lord Liverpool's

Act), that the *build* of the ship was required to be British. See the Law of Shipping and Navigation from the time of Edw. 3 to 1806, by Reeves, 1807; Beawes's *Lex Mercatoria*, and Holt on Shipping. The first statute by which the Registry Acts were consolidated was the 3 & 4 Will. 4, c. 55.

(c) The act in force before this was the 8 & 9 Vict. c. 89, as altered by the 12 & 13 Vict. c. 29. Part II. of the M. S. Act, 1854, applies to the whole of the Queen's dominions (see sect. 17); but sect. 108 provided that nothing in the statute should affect the 3 & 4 Vict. c. 56, which related to ships built and trading within the limits of the then charter of the East India Company. See further as to these ships, Wilkinson's *Law of Shipping*, chap. xiii, Lindsay's *History of Merchant Shipping*, and *Crauford v. Spooner*, 6 Moore, P. C. C. 1. The whole of the 3 & 4 Vict. c. 56, except sects. 8 & 9, is now repealed by the Statute Law Revision Act, 1874, 37 & 38 Vict. c. 96.

Vict. c. 73); the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85); and the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80) (*d*).

Part II. of the first of these acts contains the basis of the provisions by which the ownership, measurement, registry and national character of British ships are now regulated. By sect. 96, the Commissioners of Customs are empowered to alter the forms connected with Part II. of the act, and to issue instructions as to the manner of making entries, &c. by the registrars.

Sect. 19 of this act requires that all British ships shall be registered under its provisions, except,

- (1.) Ships duly registered before the act came into operation.
- (2.) Ships not exceeding fifteen tons burthen, employed solely in navigation on the rivers or coasts of the United Kingdom, or of some British possession within which the managing owners are resident (*e*).
- (3.) Ships not exceeding thirty tons burthen, and not having a whole or fixed deck, and employed solely in fishing or trading coastwise on the shores of Newfoundland or the adjacent parts, or in the Gulf of St. Lawrence, or on such portion of the coasts of Canada, Nova Scotia or New Brunswick as lie bordering thereon:

And enacts that ships required to be so registered, unless registered, shall not be recognized as British ships, and shall not be entitled to a clearance unless the master produces to the officer of customs the certificate of registry (*f*).

(*d*) The 31 & 32 Vict. c. 129, relates to the registration of ships in British Colonial possessions. See also the 32 Vict. c. 11, s. 6.

(*e*) By sect. 20 of the repealed act 12 & 13 Vict. c. 29, all boats or vessels under fifteen tons burthen wholly owned and navigated by British subjects were admitted as British vessels without registry, if confined to English and Colonial coast and river navigation. In *Benyon v. Cresswell*, 12 Q. B. 899, it was held that the property in a boat of this description might be transferred without a bill of sale, although it had once been registered.

(*f*) The M. S. Act, 1854, s. 19. If a ship attempts to proceed to sea as a British ship without a clearance or transire, the officer may detain her until the certificate is produced, *Id.* As to the effect

of unduly assuming the character of a British ship, see *post*, p. 27. Section 98 provides that where special circumstances exist, a pass may be granted to British ships to pass from one port to another without registry. The following order has been made by the Board of Customs under that section:

"Board's Minute of the 22nd and General Order of the 25th May, 1872.

"The board have had under consideration a report from the chief registrar of shipping, referring to the general order dated 5th July, 1828, under which a British built vessel is allowed, under certain conditions, to make one voyage coastwise, before registry, and to the 98th section of the M. S. Act, 1854, conferring more ex-

Sea-fishing
boats.

The Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), contains numerous regulations respecting sea-fishing boats. The 5th section enacts that the term "sea-fishing boat" shall include every vessel of whatever size and in whatever way propelled which is used by any person in sea-fishing, or in carrying on the business of a sea fisherman. The 23rd section empowers the Queen by order in council to make regulations for carrying out the registry of British sea-fishing boats. The 22nd section provides that, subject to exemptions allowed in pursuance of an order in council, every British sea-fishing boat shall be lettered and numbered and have official papers, and shall be entered or registered in a register for sea-fishing boats, and declares that a British sea-fishing boat required to be registered and not registered shall not be entitled to any of the privileges, but shall be liable to all the obligations of a British sea-fishing boat; and if any British sea-fishing boat required to be registered, and not so registered, is used as a sea-fishing boat in the seas to which the act applies, the owner and master shall each be liable to a penalty of 20*l.*, and the boat may be seized and detained. The 26th section requires the master of a British sea-fishing boat to keep on board his boat the certificate of registry, and if he neglects to do so without reasonable excuse he is liable to a penalty of 20*l.* (g).

tended power on the board in regard to such vessels, and there being reason to believe that a difference of practice exists in the mode of dealing with these cases, the board approve the following regulations to be observed in future, viz.:

"That in the case of a vessel built on the builder's account, and sent for sale to another port in the United Kingdom, the officers, as authorized by the order of the 5th July, 1828, do endorse on the builder's certificate permission for the vessel to make one voyage coastwise with cargo, the tonnage, as found by the surveys, being noted on the transire:

"That for vessels in progress of registry, and for which the builder's certificate and due surveys are in possession of the registrar at the port of intended registry, a clearance or transire be granted for one voyage with cargo to any port in the United Kingdom without requiring the production of the certificate or registry, the tonnage and port of intended registry being noted on the clearance or transire:

sire:

"That for vessels built in the United Kingdom and intended for registry in any other part of her Majesty's dominions, a special application be made to the board by the builder, or the agent to the owner, showing the vessel to have been built on account of British owners, and giving the name of the port to which she is about to proceed for registry, and when the order of the board has been obtained, the pass is to be endorsed on a copy of the certificate of survey and handed to the master of the vessel with his name endorsed thereon:

"The original survey and formula of measurement are to be forwarded to the registrar, with a letter apprizing him of the date when the vessel was cleared and of the pass given."

(g) The name of the owner, and the port to which the boat belongs, must be painted on her. The Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 176. See Appendix, "Orders in Council."

With respect to the owners of British ships, the Merchant Shipping Act, 1854, sect. 18, provides that no ship shall be deemed to be a British ship (*h*) unless she belongs wholly to owners of the following description ; that is to say :—

Who may be
owners.

(1.) Natural-born British subjects :

No natural-born subject who has taken the oath of allegiance to any foreign sovereign or state may however be such owner, unless he has subsequently taken the oath of allegiance to the Queen, and is, during the whole period of his being an owner, resident within her dominions, or a member of a British factory, or partner in a house actually carrying on business in the United Kingdom, or within the Queen's dominions (*i*).

(2.) Persons made denizens by letters of denization, or naturalized by or pursuant to any act of the imperial legislature, or any act or ordinance of the proper legislative authority in any British possession (*k*) :

Such persons must, however, during the whole period of their being owners, be resident within the Queen's dominions, or members of a British factory, or partners in a house actually carrying on business in the United Kingdom, or within the Queen's dominions, and must have taken the oath of allegiance subsequently to the period of their being so made denizens or naturalized.

(3.) Bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom, or some British possession (*l*).

(*h*) Sect. 106 of this act provides that whenever it is declared by the statute that a ship belonging to any person or body corporate qualified according to this act to be owners of British ships shall not be recognized as a British ship, such ship shall not be entitled to any benefits, privileges, advantages or protection usually enjoyed by British ships, and shall not be entitled to use the British flag or assume the British national character ; but, so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board, or by any persons belonging to her, she is to be dealt with in the same manner in all respects as if she were a recognized British ship.

(*i*) This provision is not to be affected by anything contained in the

Promissory Oaths Act, 1868, except that the form of the oath of allegiance as prescribed by that act shall be substituted for the form of the oath contained in the Merchant Shipping Act, 1854 (31 & 32 Vict. c. 72, s. 14).

(*k*) See the Naturalization Act, 1870 (33 & 34 Vict. c. 14), the 14th section of which enacts that nothing therein contained shall qualify an alien to be the owner of a British ship.

(*l*) By the 8 & 9 Vict. c. 89, s. 12, no person who had taken the oath of allegiance to any foreign state, except under the terms of some capitulation, unless he afterwards became a denizen or naturalized subject of the United Kingdom by the Queen's letters-patent, or by Act of Parliament, nor any person usually residing in any country not under the dominion of the Queen,

Where and
how registry
may be made.

By the Merchant Shipping Act, 1854, sect. 30, the following persons are authorized and required to register British ships, and are made registrars for the purposes of the act:—

- (1.) At any port or place in the United Kingdom or Isle of Man approved by the Commissioners of Customs for the registry of ships, the collector, comptroller or other principal officer of customs for the time being.
- (2.) In Guernsey and Jersey, the principal officers of customs, together with the governor, lieutenant-governor or other person administering the government of those islands.
- (3.) In Malta, Gibraltar and Heligoland, the governor, lieutenant-governor or other person administering the government.
- (4.) At any port or place within the limits of the charter, but not under the government of the East India Company, and at which no custom house is established, the collector of duties, together with the governor, lieutenant-governor or other person administering the government (*m*).
- (5.) At the ports of Calcutta, Madras and Bombay, the master attendants, and at any other port or place within the limits of the charter and under the government of the East India Company, the collector of duties, or any other person of six years' standing in the civil service of the company, who is appointed by any of the governments of the company to act for this purpose (*m*).
- (6.) At every other port or place as aforesaid within the Queen's dominions abroad, the collector, comptroller or other principal officer of customs, or of navigation laws, or if there is no such officer resident there, the governor,

unless a member of a British factory, or an agent for or a partner of a house carrying on trade in this country, could be owner in whole or in part of a registered ship. Under this statute it was held that a corporation within the United Kingdom, some of whose members were foreigners resident abroad, might register its ships. *Reg. v. Arnaud*, 9 Q. B. 806. By the 12 & 13 Vict. c. 29, s. 17, which continued in operation till the 1st May, 1855, all natural-born subjects of the Queen, denizens, or persons naturalized, whether by letters of denization, Act of

Parliament, or act or ordinance of the legislature of any of the British possessions in Asia, Africa or America, or authorized by any such act to hold shares in British shipping, were, on taking the oath of allegiance, qualified to be owners of British registered vessels. Both these acts are now repealed by the Merchant Shipping Repeal Act, 1854, the 17 & 18 Vict. c. 120.

(*m*) The government of the territories formerly governed by the E. I. Co. is by the 21 & 22 Vict. c. 106, transferred to the Crown.

lieutenant-governor or other person administering the government of the possession in which such port or place is situate (*n*).

By sect. 6 of the Merchant Shipping (Colonial) Act, 1869 (32 Vict. c. 11), power is given to the Queen, by order in council, to declare with respect to any British possession mentioned in the order, the description of persons who are to be registrars in that possession (*o*).

By sect. 29 of the Merchant Shipping Act, 1873, a similar power is given to the Queen with respect to foreign parts within which her Majesty exercises jurisdiction, in accordance with the Foreign Jurisdiction Acts (*p*).

By sect. 33, the port or place at which any British ship is registered for the time being is to be considered her port of registry, or the port to which she belongs.

Sect. 35 of the Merchant Shipping Act, 1854, provides that the application to register is to be made by the proposed owners, or by some one or more of them, or by their duly authorized agent, and, in the case of bodies corporate, by their duly authorized agent; the authority of the agent, if appointed by individuals, must be testified by writing under the hands of the appointors, and if by a corporation, under its common seal.

By sect. 36 of the Merchant Shipping Act, 1854, the ship must, before registry, be surveyed by a person duly appointed under the act, who is to grant a certificate specifying her tonnage, build, and such other particulars descriptive of her identity as may from time to time be required by the Board of Trade; this certificate must be delivered to the registrar before registry (*q*).

(*n*) As to the liability of registrars, the returns which are to be made by them to the Commissioners of Customs, and the application of fees received by the registrars, see sects. 93, 94 and 95. In all cases the place must be approved of by the Commissioners of Customs, subject to the following provision:—The governor, lieutenant-governor or other person administering the government in any British possession where any ship is registered under the authority of the act is, with regard to the performance of any act or thing relating to the registry of a ship or of any interest therein, to be considered in all respects as occupying the place of the Commissioners of Customs; and any British consular officer, in any place where there is no justice of the peace, is authorized to take any de-

claration required or permitted to be made in the presence of a justice of the peace. The M. S. Act, 1854, s. 31. As to the fees to be taken by British Consular Officers, see Appendix, "Orders in Council." See also the Colonial Shipping Act, 1868, 31 & 32 Vict. c. 129.

(*o*) On the 6th July, 1869, an order in council was made as to Singapore and Penang. See Appendix, "Orders in Council."

(*p*) The 6 & 7 Vict. c. 94; 28 & 29 Vict. c. 116; 29 & 30 Vict. c. 87; 38 & 39 Vict. c. 85; 41 & 42 Vict. c. 67. An Order in Council has been made appointing Shanghai a port of British Registry. See Appendix, "Orders in Council."

(*q*) A form of this certificate is given in the schedule to the M. S. Act, 1854,

Port of
registry.

Certificate of
survey.

Rules for
ascertaining
tonnage.

The Merchant Shipping Act, 1854, contains in sects. 20 to 24, rules for ascertaining the tonnage both of sailing and steam vessels (*r*). The rules are mainly based upon the principle that the number of tons of water displaced by the vessel when fully laden affords the true measure of her capacity (*s*); but special provision is made for the measurement of permanent closed-in spaces on an upper deck and of the space under a spar deck. Nothing, however, is to be added to the tonnage for a closed-in space on the upper deck solely appropriated to the berthing of the crew (*t*), unless such space exceeds one-twentieth of the remaining tonnage of the ship, and nothing is to be added to the tonnage in respect of any building erected for the shelter of deck passengers and approved by the Board of Trade. In

Deduction for
crew space
and engine
room.

see Form A. By sect. 96 of that act, however, the Commissioners of Customs are empowered, with the consent of the Board of Trade, to alter from time to time the forms contained in the schedule of the act, on giving sufficient public notice before issuing an altered form. The form now in use, which will be found in the Appendix, "Forms," No. 1, varies from that contained in the schedule to the act.

(*r*) The 23rd sect. of the M. S. Act, 1854, is to be construed as if the Board of Trade were therein named instead of the Commissioners of Customs. The M. S. Act, 1872, s. 3.

By sect. 29 of the M. S. Act, 1854, and sect. 13 of the M. S. Act, 1872, the Board of Trade may, with the sanction of the Treasury, appoint persons to superintend the survey and admeasurement of ships, and may make from time to time regulations for this purpose. And may with the like approval make such modifications and alterations as from time to time become necessary in the tonnage rules, in order to the more accurate and uniform application thereof and effectual carrying out of the principle of admeasurements therein adopted.

In *The City of Dublin Steam Packet Co. v. Thompson*, 19 C. B., N. S. 553; S. C., Cam. Scacc., L. R., 1 C. P. 355, it was held that the 29th sect. of the M. S. Act, 1854, did not authorize the commissioners to make rules for the measurement of the tonnage of steam vessels which would have the effect of altering the allowance in respect of the space occupied by the propelling power as provided by sect. 23 of the same Act.

By the 13th sect. of the M. S. Act, 1872, all duties in relation to the survey and measurement of ships under that act, or the acts amended thereby, are to be performed by the surveyors appointed under the 4th part of the act of 1854, in accordance with the regulations of the Board of Trade.

As to the fees to be paid with respect to the survey and measurement of ships under the M. S. Acts, see the M. S. Act, 1873, s. 30, and Schedule III. and Appendix, "General Table of Fees charged under the authority of the Board of Trade," "Forms," No. 55, and the M. S. Act, 1876, s. 39, as to the payment of such fees. As to like fees payable at Shanghai, see Appendix, "Orders in Council."

(*s*) The mode of measuring directed by these sections differs from that prescribed by sects. 16, 17, 18 and 19 of the 8 & 9 Vict. c. 89. In 1849, commissioners were appointed by the government to consider the best method of measuring ships, and they recommended an external measurement. This suggestion being open to many objections was never adopted. The system at present in force was proposed by Mr. Moorsom, one of those commissioners.

(*t*) See as to what is not "space available for cargo" or for "accommodation of passengers and crew" within the M. S. Act, 1854, s. 21, subs. 4, *Lord Advocate v. Clyde Steam Navigation Co.*, 2 L. R., Sc. App. Cases, 409. See also *The Franconia*, 3 P. D. 164. The rules, however, with respect to the deductions which may be claimed for crew space in British ships are subject to the provisions of the M. S. Act, 1867, s. 9.

steamships deduction is to be made in respect of the space occupied by the propelling power of the ship.

The following provisions respecting deck cargoes are contained in sect. 23 of the Merchant Shipping Act, 1876:—If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act, 1854 (*u*), carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable. The space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods. The tonnage of such space shall be ascertained by an officer of the Board of Trade or of Customs, in manner directed by sub-sect. 4 of sect. 21 of the Merchant Shipping Act, 1854, and when so ascertained shall be entered by him in the ship's official log book, and also in a memorandum which he shall deliver to the master, and the master shall, when the said dues are demanded, produce such memorandum in like manner as if it were the certificate of registry, or, in the case of a foreign ship, the document equivalent to a certificate of registry, and in default shall be liable to the same penalty as if he had failed to produce the said certificate or document (*v*).

Deck cargo
spaces.

The provisions of this section do not apply to deck cargo carried by a ship while engaged in the coasting trade of any British possession (*w*).

By sect. 26 of the Merchant Shipping Act, 1854, when the tonnage of any ship has been ascertained and registered, it is thenceforth to be deemed her tonnage, and it must be repeated in every subsequent registry, unless an alteration is made in her form or capacity, or the tonnage has been erroneously computed, in which case the ship may be remeasured and her tonnage correctly registered (*x*).

(*u*) The M. S. Act, 1854, s. 2.

(*v*) *Ib.* s. 50. For the forms issued by the Board of Trade for the purpose of carrying out the above provisions of the act of 1876, see Appendix,

"Forms," No. 45.

(*w*) The M. S. Act, 1876, s. 44.

(*x*) The M. S. Act, 1862, s. 4, provides that any body corporate or persons having power to levy tonnage

Re-measurement.

By sect. 27 of the Merchant Shipping Act, 1854, ships registered before the act came into operation need not have their registered tonnage altered so as to accord with the new system; but any owner may, if he wishes it, have his ship remeasured according to these rules (*x*); and by sect. 28, a power was given to the Commissioner of Customs, which has since been transferred to the Board of Trade (*y*), to require that the engine-rooms of steam ships which have been measured before the present act, and altered by the introduction of store rooms or coal bunkers across them, shall be remeasured, so as not to exclude from the tonnage of the ships, by reason of the deduction which is allowed for the engine-room, a larger space than is proper (*z*).

Measurement of foreign ships.

These rules as to tonnage do not, of course, affect foreign ships; but by the Merchant Shipping Act, 1862, s. 60, whenever it is made to appear to the Queen that the rules concerning the measurement of tonnage for the time being in force under the Merchant Shipping Act, 1854, have been adopted by the government of any foreign country, and are in force in that country, the Queen may, by order in council, direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers (*a*); and such ships need not be remeasured in any port or place in the Queen's dominions, but are to be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes, in, to and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships (*b*).

rates on ships may, if they think fit, with the consent of the Board of Trade, levy such tonnage rates upon the registered tonnage of the ships as determined by the rules for the measurement of tonnage for the time being in force under the principal act, notwithstanding that the local act or acts under which such rates are levied provides for levying the same upon some different system of tonnage measurement.

(*x*) By the M. S. Act, 1855, s. 14, the owner of a ship which has been measured under Rule II. of sect. 22 of the M. S. Act, 1854, may, on application, have the ship remeasured under Rule I. in sect. 21.

(*y*) The M. S. Act, 1872, s. 3.

(*z*) As to the fees payable on such re-measurement, see the M. S. Act, 1873, s. 30; the M. S. Act, 1876, s. 89, and Appendix, "Forms," No. 55.

(*a*) *The Franconia*, 3 P. D. 164.

(*b*) As to the effect of such an order in council and its publication, alteration and revocation, see the M. S. Act, 1862, ss. 61, 62, 63 and 64. Orders in council have been made extending the measurement rules to the following countries:—Austro-Hungary, 19th August, 1871; Denmark, 29th February, 1868, 30th December, 1878; France, 5th May, 1873; Germany, 26th June, 1873; Italy, 30th September, 1873; Netherlands, 26th October, 1875; Norway, 17th May, 1876; Spain, 17th March, 1875; Sweden, 17th March,

By the Merchant Shipping Act, 1876 (ss. 37 and 38), power is conferred upon her Majesty by order in council to apply the provisions of the Merchant Shipping Acts to the ships of any foreign state, provided the government of such foreign state shall be desirous that such provisions shall be so applied (c).

With respect to the names of British ships, sect. 6 of the Merchant Shipping Act, 1871, provides that the following rules shall be observed:—

- (1.) A ship shall not be described by any name other than that by which she is for the time being registered:
- (2.) No change shall be made in the name of a ship without the previous permission of the Board of Trade signified in writing under their seal, or under the hand of one of their secretaries or assistant secretaries. Upon such permission being granted, the ship's name shall forthwith be altered in the register book, in the ship's certificate of registry, and on her bows and stern:
- (3.) If in any case it is shown to the satisfaction of the Board of Trade that the name of any ship has been changed without such permission as aforesaid, they shall direct that her name be altered into that which she bore before such change, and the name shall be altered in the register book, in the ship's certificate of registry, and on her bows and stern accordingly:
- (4.) Where a ship having once been registered has ceased to be so registered, no person, unless ignorant of such previous registry (proof whereof shall lie on him), shall apply to register, and no registrar shall knowingly register, such ship, except by the name by which she was previously registered, unless with the permission of the Board of Trade granted as aforesaid.

Every person who acts or suffers any person under his control to act in contravention of this section, or who omits to do, or suffers any person under his control to omit to do, anything required by this section, shall for each offence incur a penalty not exceeding 100*l.*, and any principal officer of Customs may detain the ship until the provisions of this section are complied with.

1875; United States, 30th July, 1868. Council.”
The material portions of these orders
are in the Appendix, “Orders in

(c) See *The Franconia*, 3 P. D. 164.

Application for a change of name shall be made in writing to the Board of Trade. If the Board are of opinion that the application is made on reasonable grounds they may entertain the same, and shall thereupon require notice thereof to be published in such form and manner as they think fit (c).

The Merchant Shipping Act, 1873, sect. 5, enacts that, "Where a foreign ship, not having at any previous time been registered as a British ship, becomes a British ship, no person shall apply to register, and no registrar shall knowingly register, such ship except by the name which she bore as a foreign ship immediately before becoming a British ship, unless with the permission of the Board of Trade granted in manner directed by sect. 6 of the Merchant Shipping Act, 1871."

Any person who acts, or suffers any person under his control to act, in contravention of this section is liable to a penalty not exceeding 100*l*.

Marks on
ship.

The 3rd section of the Merchant Shipping Act, 1873, provides substantially as follows:—

Every British ship registered after the passing of this act shall, before registry, and every British ship registered before the passing of this act shall, on or before the 1st day of January, 1874, be permanently and conspicuously marked to the satisfaction of the Board of Trade, as follows:—

Name.

Her name shall be marked on each of her bows, and her name and the name of her port of registry shall be marked on her stern, on a dark ground in white or yellow letters, or on a light ground in black letters, such letters to be of a length not less than four inches, and of proportionate breadth (d);

Number.

Her official number and the number denoting her registered tonnage shall be cut in on her main beam;

Scale of feet.

A scale of feet denoting her draught of water shall be marked on each side of her stem and of her stern post in Roman capital letters or in figures, not less than six inches in length, the lower line of such letters or figures to coincide with the draught line denoted thereby. Such letters or figures shall be marked by being cut in and painted white

(c) For the fees payable on change of name, see the M. S. Act, 1873, s. 30, the M. S. Act, 1876, s. 39, and Appendix, "Forms," No. 56.

(d) The name and port of the ship must also be painted on the ship's boats. The 39 & 40 Vict. c. 36, s. 175.

or yellow on a dark ground, or in such other way as the Board of Trade may from time to time approve.

The Board of Trade may, however, exempt any class of ships from the requirements of this section or any of them (*e*).

If the scale of feet showing the ship's draught of water is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall incur a penalty not exceeding 100*l*.

The marks shall be permanently continued, and no alteration shall be made therein, except in the event of any of the particulars thereby denoted being altered in the manner provided by the Merchant Shipping Acts, 1854 to 1873.

Any owner or master of a British ship who neglects to cause his ship to be marked as aforesaid, or to keep her so marked, and any person who conceals, or obliterates, or suffers any person under his control to conceal or obliterate, any of the said marks, except in the event aforesaid, or except for the purpose of escaping capture by an enemy, shall incur a penalty not exceeding 100*l*., and any officer of customs on receipt of a certificate from a surveyor or inspector of the Board of Trade that a ship is insufficiently or inaccurately marked may detain the same until the insufficiency or inaccuracy has been remedied.

Provided that no fishing vessel duly registered, lettered and numbered in pursuance of the Sea Fisheries Act, 1868, shall be required to have her name and port of registry marked under this section.

The Merchant Shipping Act, 1876, contains the following provisions respecting deck and load lines, which, although they are not solely connected with the matter of registration, may conveniently be mentioned here :—

Deck and load lines.

The 25th section enacts that every British ship (except ships under eighty tons register employed solely in the coasting trade (*f*), ships employed solely in fishing, and pleasure yachts) shall be permanently and conspicuously marked with lines of not less than twelve inches in length and one inch in breadth, painted longitudinally on each side amidships, or as near thereto as is practicable, and indicating the position of each deck which is above water.

(*e*) See *post*, Appendix, note to this section.

(*f*) The act does not apply to vessels employed exclusively in trading in any

river or inland water in any British possession. Sect. 44. See *post*, p. 30, note (*k*).

The upper edge of each of these lines shall be level with the upper side of the deck plank next the waterway at the place of marking.

The lines shall be white or yellow on a dark ground, or black on a light ground.

With respect to the marking of a load-line on British ships, it is declared by the 26th and 27th sections that the following provisions shall have effect :—

- (1.) The owner of every British ship (except ships under eighty tons register employed solely in the coasting trade, ships employed solely in fishing, and pleasure yachts) shall, before entering his ship outwards from any port in the United Kingdom upon any voyage for which he is required so to enter her, or, if that is not practicable, as soon after as may be, mark upon each of her sides amidships, or as near thereto as is practicable, in white or yellow on a dark ground, or in black on a light ground, a circular disc twelve inches in diameter, with a horizontal line eighteen inches in length drawn through its centre :
- (2.) The centre of this disc shall indicate the maximum load-line in salt water to which the owner intends to load the ship for that voyage :
- (3.) He shall also, upon so entering her, insert in the form of entry delivered to the collector or other principal officer of customs a statement in writing of the distance in feet and inches between the centre of this disc and the upper edge of each of the lines indicating the position of the ship's decks which is above that centre :
- (4.) If default is made in delivering this statement in the case of any ship, any officer of customs may refuse to enter the ship outwards :
- (5.) The master of the ship shall enter a copy of this statement in the agreement with the crew (g) before it is signed by any member of the crew, and no superintendent of any mercantile marine office shall proceed with the engagement of the crew until this entry is made :
- (6.) The master of the ship shall also enter a copy of this statement in the official log book (h) :
- (7.) When a ship has been marked as by this section required,

(g) See Appendix, "Forms," Nos. 24 and 25.

(h) See Appendix, "Forms," No. 43.

she shall be kept so marked until her next return to a port of discharge in the United Kingdom.

With respect to the marking of a load-line on British ships employed in the coasting trade, the following provisions shall have effect :—

- (1.) The owner of every British ship employed in the coasting trade on the coasts of the United Kingdom (except ships under eighty tons register employed solely in that trade) shall, before proceeding to sea from any port, mark upon each of her sides amidships, or as near thereto as is practicable, in white or yellow on a dark ground, or in black on a light ground, a circular disc twelve inches in diameter, with a horizontal line eighteen inches in length drawn through its centre :
- (2.) The centre of this disc shall indicate the maximum load-line in salt water to which the owner intends to load the ship, until notice is given of an alteration :
- (3.) He shall also once in every twelve months, immediately before the ship proceeds to sea, send or deliver to the collector or other principal officer of customs of the port of registry of the ship a statement in writing of the distance in feet and inches between the centre of the disc and the upper edge of each of the lines indicating the position of the ship's decks which is above that centre (i) :
- (4.) The owner, before the ship proceeds to sea after any renewal or alteration of the disc, shall send or deliver to the collector or other principal officer of customs of the port of registry of the ship notice in writing of such renewal or alteration, together with such statement in writing as before mentioned of the distance between the centre of the disc and the upper edge of each of the deck-lines :
- (5.) If default is made in sending or delivering any notice or statement required by this section to be sent or delivered, the owner shall be liable to a penalty not exceeding 100% :
- (6.) When a ship has been marked as by this section required, she shall be kept so marked until notice is given of an alteration.

The 28th section enacts that any owner or master of a British

(i) See Appendix, "Forms," No. 45.

ship who neglects to cause his ship to be marked as by the Merchant Shipping Act, 1876, required, or to keep her so marked, or who allows the ship to be so loaded as to submerge in salt water the centre of the disc, and any person who conceals, alters, or obliterates, or suffers any person under his control to conceal, alter, or obliterate, any of the said marks, except in the event of the particulars thereby denoted being lawfully altered, or except for the purpose of escaping capture by an enemy, shall for each offence incur a penalty not exceeding 100*l*.

If any of the marks required by this act is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall incur a penalty not exceeding 100*l*. (*k*).

Register
book.

By sect. 32 of the Merchant Shipping Act, 1854, every registrar must keep a book, to be called "The Register Book," and enter therein the particulars specified in the act (*l*).

(*k*) The following provisions respecting a ship's draught of water are contained in the M. S. Act, 1871, sect. 5:—"The Board of Trade may, in any case or class of cases in which they think it expedient so to do, direct any person appointed by them for the purpose to record, in such manner and with such particulars as the Board of Trade direct, the draught of water of any sea-going ship, as shown on the scale of feet on her stem and on her stern post, upon her leaving any dock or harbour for the purpose of proceeding to sea; and such person shall thereupon keep such record, and shall from time to time forward the same, or a copy thereof, to the Board of Trade; and such record, or any copy thereof, if produced by or out of the custody of the Board of Trade, shall be admissible in evidence of the draught of water of the ship at the time specified in the record.

"The master of every British sea-going ship shall, upon her leaving any dock, wharf, port, or harbour for the purpose of proceeding to sea, record her draught of water in the official logbook (if any), and shall produce such record to any principal officer of customs whenever required by him so to do, or in default of such production shall incur a penalty not exceeding 20*l*." See Appendix, "Forms," No. 43.

The M. S. Act, 1873, sect. 4, is as follows:—"The record of the draught of water of any sea-going ship required

under sect. 5 of the Merchant Shipping Act, 1871, shall, in addition to the particulars thereby required, specify the extent of her clear side in feet and inches.

"The term 'clear side' means the height from the water to the upper side of the plank of the deck from which the depth of hold as stated in the register is measured, and the measurement of the clear side is to be taken at the lowest part of the side.

"Every master of a sea-going ship shall, upon the request of any person appointed to record the ship's draught of water, permit such person to enter the ship and to make such inspections and take such measurements as may be requisite for the purpose of such record, and any master who fails so to do, or impedes or suffers anyone under his control to impede any person so appointed in the execution of his duty, shall for each offence incur a penalty not exceeding 5*l*."

(*l*) This book is accessible to the public for inspection on payment of a fee of 1*s*., see sect. 92. To forge or fraudulently alter this book, or any certificate of surveyor, certificate of registry, declaration of ownership, bill of sale, instrument of mortgage, certificate of mortgage or sale, or any entry or indorsement required by the second part of the act, is a felony. See sect. 101. As to the proof of this and other documents required by the second part of the act, see sect. 107, and the M. S. Act, 1855, s. 15.

The following are the rules with respect to entries in the register book, which are laid down by the Merchant Shipping Acts, 1854 and 1880:—

Sect. 37 of the Merchant Shipping Act, 1854, as amended by sect. 2 of the Merchant Shipping Act, 1880, prescribes that,—

- (1.) The property in a ship must be divided into sixty-four shares (i).
- (2.) Subject to the provisions with respect to joint owners or owners by transmission, not more than sixty-four individuals may be registered at the same time as owners of one ship. This rule does not, however, affect the beneficial title of any number of persons, or of a company represented by or claiming under or through a registered owner or joint owner.
- (3.) No person may be registered as owner of a fractional part of a share; but any number of persons not exceeding five may be registered as joint owners of a ship, or of a share or shares therein.
- (4.) Joint owners are to be considered as constituting one person only with reference to these regulations, and may not dispose in severalty of any interest in a ship, or share in respect of which they are registered.
- (5.) Bodies corporate may be registered as owners by their corporate name.

By sect. 38, before registration, the owner of the ship, or of any share in her, must make and subscribe a declaration in the form prescribed by the act, referring to the ship as described in the certificate of the surveyor, and containing the following particulars (j):—

- (1.) His qualification to be owner.

(i) This artificial rule of division was also contained in the 6 Geo. 4, c. 110; and in the later acts which preceded the statute now in force. It seems to have been selected on the supposition that the binary system of halving the ship, and each of the resulting shares, until the whole is reduced to sixty-four parts, is, practically, convenient. See *Holt on Shipping*, p. 25.

(j) A form is given in the schedule to the act, but this form has been altered. For the forms now in use, see Appendix, "Forms," Nos. 2—7. These forms are to be used as forms of declarations

of ownership by transferees under s. 56 of the act. If it is shown to the satisfaction of the registrar that from any reasonable cause a person cannot make this or any other declaration, or produce any evidence required by the act in these respects, the registrar, with the sanction of the Commissioners of Customs, and on such terms as they think fit, may dispense with it. See sect. 97. With respect to infants, lunatics or others who are incapable of making a declaration, see sect. 99. See *Michael v. Fripp*, L. R., 7 Eq. 95.

- (2.) The time when, and the place where, the ship was built, or (if foreign built, and the time and place of building not known) a statement that she is foreign built, and that he does not know the time or place of her building; and in the case of a foreign ship, her foreign name, or (in the case of a ship condemned) a statement of the time, place and Court at and by which she was condemned.
- (3.) The name of the master.
- (4.) The number of shares of which he is entitled to be registered as owner.
- (5.) A denial that, to the best of his knowledge and belief, any unqualified person or body of persons is entitled as owner to any legal or beneficial interest (*k*) in the ship or any share in her :

This declaration must be made and subscribed in the presence of the registrar if the declarant reside within five miles of the custom-house of the port of registry, but if beyond that distance in the presence of any registrar or of a justice of the peace (*l*).

By sect. 39, before registration by a body corporate as owner of a ship or of any share therein, the secretary or other duly appointed public officer must make or subscribe, in the presence of the registrar, a declaration in the prescribed form (*m*), referring to the ship as described in the certificate of the surveyor, and containing a statement of such circumstances of the constitution and business of the body corporate as prove it to be qualified to own a British ship, together with the other particulars which are required to be given by an individual in such a declaration.

Builder's certificate.

Sect. 40 provides that, upon the first registry of a ship there

(*k*) This includes interests arising under contract and other equitable interests. M. S. Act, 1862, s. 3. See *The Union Bank v. Lenanton*, 3 C. P. D. 243; *Bathany v. Bouch*, 44 L. T. 177.

(*l*) By the M. S. Act, 1865, s. 9, any person who, in any declaration made in the presence of or produced to any registrar of shipping in pursuance of the second part of the M. S. Act, 1864, or in any documents or other evidence produced to such registrar, willfully makes or assists in making, or procures to be made, any false statement concerning the title to, or the ownership of, or the interests existing in any ship or any share or

shares in any ship, or who utters, produces or makes use of any declaration or document containing any such false statement, knowing the same to be false, is declared guilty of a misdemeanor. And by sect. 101 of the M. S. Act, 1864, the forging, or procuring to be forged, fraudulently altering, or procuring to be fraudulently altered, any register book, certificate of surveyor, certificate of registry, declaration of ownership, bill of sale, instrument of mortgage, certificate of mortgage or sale, or any entry or indorsement required by the second part of the act, is made a felony.

(*m*) See Appendix, "Forms," No. 8.

must, in addition to the declaration of ownership, be produced:—

- (1.) In the case of a British-built ship, a certificate (which the builder is required to grant under his hand) containing a true account of the proper denomination and of the tonnage of the ship as estimated by him, and of the time when and of the place where she was built, together with the name of the party (if any) on whose account he has built her; and, if any sale or sales have taken place, the bill or bills of sale under which the ship or share has become vested in the party requiring to be registered as owner (*n*).
- (2.) In the case of a foreign-built ship, the same evidence as in the case of a British-built ship, unless the person requiring to be registered, or, in the case of a body corporate, the duly appointed officer, declares that the time or place of her building is unknown, or that the builder's certificate cannot be procured, in which case there need be produced only the bill or bills of sale under which the ship or share became vested in the party requiring to be registered.
- (3.) In the case of a ship condemned by any competent Court, an official copy of her condemnation.

By sect. 41, a builder who wilfully makes a false statement in any certificate required by the act to be granted by him incurs a penalty not exceeding 100*l.* for each offence (*o*).

Sect. 42 provides that, the foregoing requisites having been complied with, the registrar must enter in the register book:—

Entry in
register book.

- (1.) The name of the ship, and of the port to which she belongs.
- (2.) The details as to her tonnage, build and description comprised in the certificate of the surveyor.
- (3.) The particulars as to her origin stated in the declaration or declarations of ownership.
- (4.) The names and descriptions of her registered owner or

(*n*) Before the registration of a ship, the builder's certificate is often treated in practice as in the nature of a document of title. See *Reid v. Fairbanks*, 13 C. B. 692. A good equitable mort-

gage may be created by the deposit of the builder's certificate of an unfinished ship. *Ex parte Hodgkin*, L. R., 20 Eq. 746.

(*o*) See also sect. 101.

owners, and if there is more than one owner, the proportions in which they are interested in the ship (*p*).

By sect. 43, no notice of any trust, express, implied or constructive, may be entered in the register book, or is receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship or share has power absolutely to dispose of it, and to give effectual receipts for any money paid or advanced by way of consideration (*q*).

Certificate of
registry.

By sect. 44 of the Merchant Shipping Act, 1854, upon the completion of the registry of a ship the registrar is to grant a certificate of registry in the form provided by the act (*r*), comprising:—

- (1.) The name of the ship and of the port to which she belongs.
- (2.) The details as to her tonnage, build and description comprised in the surveyor's certificate.
- (3.) The name of her master.
- (4.) The several particulars as to her origin stated in the declaration or declarations of ownership.
- (5.) The names and descriptions of her registered owner or owners, and if there is more than one owner, the proportions in which they are interested, indorsed upon the certificate (*s*).

(*p*) Under the 8 & 9 Vict. c. 89, s. 36, where ships were held by partners, it was not necessary to distinguish the proportionate interest of each. The names, however, of all the partners must have been placed on the register. See *Slater v. Willis*, 1 Beav. 354, decided on similar words in the Registry Act, 6 Geo. 4, c. 110. If a person is by mistake registered as the owner of a ship which is proved to be the property of another, the Chancery Division will correct the error, and direct the person whose name is on the register to transfer the ship to the party declared entitled. The jurisdiction of the Chancery Division is not taken away by the M. S. Act, 1854, in cases not provided for by the statute. *Holder-ness v. Lamport*, 29 Beav. 129; 30 L. J., Chan. 489. As to the jurisdiction of the Admiralty Division to correct a mistake in the register book, see *The Rose*, L. R., 4 A. & E. 6.

(*q*) By the M. S. Act, 1855, s. 10,

shares in ships registered under the M. S. Act, 1854, are to be deemed to be included in the word "stock," as defined by the Trustee Act, 1850 (13 & 14 Vict. c. 60), and the provisions of that act are made applicable to such shares. And see the M. S. Act, 1862, s. 3; and *The Horlock*, 2 P. D. 243.

(*r*) For the form now in use see Appendix, "Forms," No. 9.

(*s*) The Colonial Shipping Act, 1868 (31 & 32 Vict. c. 129, s. 1), enables the governor of any British possession, with the approval of one of her Majesty's principal secretaries of state, to make regulations providing that, on an application for registration under the M. S. Act, 1854, in the possession, of any ship not exceeding sixty tons burden, the registrar may grant in lieu of a certificate of registry, as required by that act, a certificate of registry to be terminable at the end of six months, or of any longer period, and all such

The 36th section of the Merchant Shipping Act, 1876, requires that the name and address of the managing owner for the time being of every British ship registered at any port or place in the United Kingdom shall be registered at the custom house of the ship's port of registry. Where there is not a managing owner, there shall be so registered the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purposes of the Merchant Shipping Acts, 1854 to 1876, be under the same obligations, and subject to the same liabilities, as if he were the managing owner (*t*). If default is made in complying with this requirement, the owner is liable, or if there be more owners than one, each owner is liable, in proportion to his interest in the ship, to a penalty not exceeding in the whole 100% each time the ship leaves any port in the United Kingdom.

Registered
managing
owner.

By sect. 45 of the Merchant Shipping Act, 1854, whenever a change takes place in the registered ownership of a ship, if it occurs when the ship is at her port of registry, the master must forthwith deliver the certificate of registry to the registrar, and he must indorse thereon a memorandum of the change. If the change occurs during the absence of the ship from her port of registry, then upon her first return the master must deliver the certificate of registry to the registrar, and he must indorse on it the memorandum; or if she previously arrives at any port where there is a British registrar, he must, upon being advised by the registrar of her port of registry of the change having taken place, indorse a like memorandum thereof on the certificate of registry, and may for that purpose require the certificate to be delivered to him, so that the ship be not thereby detained. Any master who fails to deliver to the registrar the certificate of registry incurs a penalty not exceeding 100%.

Indorsement
on certificate,

—of change of
ownership,

By sect. 46, whenever the master of a British registered ship is changed, if such change is made in consequence of the sentence of a naval Court, the presiding officer of the Court, or if it takes place from any other cause, the registrar, or, if there is no registrar, the British consular officer resident at the port where

certificates shall be in such form, and subject to such conditions, as the regulations prescribe. Any ship to which such certificate is granted shall, while such certificate is in force, be deemed a

registered British ship.

(*t*) See *Steel v. Lester*, 3 C. P. D. 121, decided on a similar provision of the M. S. Act, 1875.

—of change of master. the change takes place, must indorse on the certificate of registry a memorandum of the change, subscribed with his name, and forthwith report the change of master to the Registrar General of Shipping and Seamen (*u*); and the officers of customs at any port situate within the Queen's dominions may refuse to admit any person to do any act at such port as master of any British ship, unless his name is inserted in or indorsed upon the certificate of registry as the last appointed master.

By sect. 47, the registrar may, with the sanction of the Commissioners of Customs, upon the delivery up to him of the former certificate of registry, grant a new certificate in the place of the one so delivered up.

Loss of certificate.

Sect. 48 provides, that if the certificate of registry be mislaid, lost or destroyed, if the event occurs at any port in the United Kingdom, the ship being registered in the United Kingdom, or at any port in any British possession, the ship being registered in the same British possession, then the registrar of her port of registry must grant a new certificate of registry, in lieu of and as a substitute for her original certificate of registry. If, however, such event occurs elsewhere, the master or some other person having knowledge of the circumstances must make a declaration before the registrar of any port having a British registrar at which the ship is at the time or first arrives after the mislaying, loss or destruction. This declaration must state the facts of the case, and the names and descriptions of the registered owners, to the best of the declarant's knowledge and belief; and the registrar must thereupon grant a provisional certificate as near to the form appointed by the act as circumstances permit, and insert a statement of the circumstances under which the provisional certificate is granted.

By sect. 49, the provisional certificate must, within ten days after the first subsequent arrival of the ship at her port of discharge in the United Kingdom, if registered in the United Kingdom, or if registered elsewhere, at her port of discharge in the British possession within which her port of registry is situate, be delivered up to the registrar, who must thereupon grant a new one, as near to the form appointed by the act as circumstances permit. If the master neglects to deliver up the

(*u*) M. S. Act, 1872, s. 4.

certificate within such time he incurs a penalty not exceeding 50*l.* (r).

Sect. 50 provides, that the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge or interest whatsoever which any owner, mortgagee or other person may have or claim to have on or in the ship described in such certificate. If any person, whether interested or not in the ship, refuses on request to deliver up the certificate, when in his possession or under his control, to the person for the time being entitled to the custody of it for the purposes of navigation, or to any registrar, officer of the customs, or other person legally entitled to require it, a magistrate, or any Court capable of taking cognizance of such matter, may summon and examine the person refusing, and, unless it is proved that there was reasonable cause for the refusal, the offender will incur a penalty not exceeding 100*l.* (x). If, however, it is shown that the certificate is lost, the party complained of must be discharged, and the magistrate or Court may thereupon certify that the certificate is lost.

Detainer and
use of certifi-
cate.

It has been decided that the effect of this section is to make a pledge of the certificate for whatever purpose void. Therefore where a person who was sole owner and captain of a ship pledged the certificate of registry for a good consideration, it was held that he might nevertheless demand it for the purposes of navigation, and that if it was not delivered to him, he might maintain an action against the pledgee (y).

By sect. 51, if the person charged with the detainer or refusal is proved to have absconded, so that a warrant cannot be served upon him, or if he persists in his refusal to deliver it, the magis-

(r) See also as to provisional certificates where a ship is transferred at a foreign port, sect. 54, *post*, p. 24.

(x) In *R. v. Walsh*, 1 A. & E. 481, which was decided upon a similar provision contained in the 8 & 9 Vict. c. 89, s. 30, it was held that a conviction must state the purpose for which the certificate was required. See also *R. v. Fitzley*, 13 East, 91, which was decided on an earlier act, the words of which are not the same. In a case in which a ship's husband and managing owner, who also held the majority of shares, de-

manded of the master, who was also part owner, the certificate of registry, while the ship was in harbour and before she had discharged, but gave no reason for doing so, it was held, that there was reasonable ground for the master's refusing to deliver it up. *Arkle v. Hensell*, 8 E. & B. 828; see the *St. Olaf*, 2 P. D. 113.

(y) *Wilby v. Crawford*, 1 B. & S. 253; *S. C.* in error, *ib.* 265. The Exchequer Chamber adopted the view taken by the Court below, but expressed some doubt on the point.

trate must certify the fact, and the same proceedings may then be taken as in the case of a certificate of registry mislaid, lost or destroyed, or as near thereto as circumstances permit.

By sect. 52, if the master or owner of a ship uses or attempts to use for her navigation a certificate of registry not legally granted in respect of it, he is guilty of a misdemeanor, and any military or naval commissioned officer on full pay, or any British officer of customs, or any British consular officer, may seize and detain the ship, and bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having Admiralty jurisdiction in the Queen's dominions. If such Court is of opinion that the use or attempt at use has taken place, it must pronounce the ship, with her tackle, apparel and furniture, to be forfeited to the Queen, and may award a portion of the proceeds arising from her sale to the officer so bringing her in.

On loss of
ship certi-
ficate to be
delivered up.

By sect. 53, if a registered ship is either actually or constructively lost, taken by the enemy, burnt or broken up, or if by reason of a transfer to any persons not qualified, or otherwise, a ship ceases to be a British ship, every person who then owns her, or any share of her, must, immediately upon obtaining knowledge of any such occurrence, if no notice thereof has already been given to the registrar at her port of registry, give such notice to him, and he must make an entry thereof in his register book; and, except in cases where the certificate of registry is lost or destroyed, the master of a ship so circumstanced must immediately, if the event occurs in port, or if elsewhere, within ten days after his arrival in port, deliver the certificate of registry to the registrar, or, if there be no registrar, to the British consular officer at such port, and the registrar, if he is not himself the registrar of her port of registry, or the British consular officer, must forthwith forward the certificate to the registrar of the ship's port. An owner or master who, without reasonable cause, makes default in obeying these provisions, incurs for each offence a penalty not exceeding 100*l*.

It is provided by sect. 54 of the Merchant Shipping Act, 1854, that if a ship becomes the property of persons qualified to be owners of British ships at any foreign port, the British consular officer resident there may grant to the master, upon his application, a provisional certificate, stating—

The name of the ship :

The time and place of her purchase, and the names of her purchasers :

The name of her master :

The best particulars as to her tonnage, build and description that he is able to obtain.

He must forward a copy of the certificate, at the first convenient opportunity, to the Registrar-General of Shipping and Seamen (z). This certificate possesses the same force as a certificate of registry until the expiration of six months, or until such earlier time as the ship arrives at some port where there is a British registrar ; but upon the expiration of this period, or upon arrival at such port, it is void to all intents.

Under certain circumstances, it becomes necessary that a ship should be registered anew. On this head the Merchant Shipping Act, 1854, provides by sect. 84, that whenever any registered ship is so altered as not to correspond with the particulars relating to her tonnage or description contained in the register book, then, if such alteration is made at a port where there is a registrar, the registrar of such port, but if made elsewhere, the registrar of the first port having a registrar at which the ship arrives after her alteration, must, on application made to him, and on the receipt of a certificate from the proper surveyor specifying the nature of the alteration, either retain the old certificate of registry and grant a new certificate of registry, containing a description of the ship as altered, or indorse on the existing certificate a memorandum of the alteration, and subscribe his name to such indorsement. The registrar to whom this application is made, if he is the registrar of the port of registry of the ship, must himself enter in his register book the particulars of the alteration, and the fact of the new certificate having been granted or of the indorsement having been made on the existing certificate ; but if he is not the registrar of that port he must forthwith report such particulars and facts, accompanied by the old certificate of registry in cases where a new one has been granted, to the registrar of the port of registry of the ship, who must retain the old certificate, and enter the particulars and facts in his register book accordingly.

Registry anew
and transfer
of registry.

By sect. 85, when the registrar to whom application is made

(z) The M. S. Act, 1872, s. 4.

in respect of an alteration, is the registrar of the port of registry, he may, if he thinks fit, instead of registering it, require the ship to be registered anew. Other registrars may require the ship to be registered anew, but they must grant a provisional certificate, or make a provisional indorsement of the alteration in cases where no registry anew is required, taking care to add to such certificate or indorsement a statement that it is made provisionally, and to insert in their report to the registrar of the port of registry of the ship a like statement.

By sect. 86, every provisional certificate, or certificate provisionally indorsed, must within ten days after the first subsequent arrival of the ship at her port of discharge in the United Kingdom, if registered in the United Kingdom, or if registered elsewhere, at her port of discharge in the British possessions within which her port of registry is situate, be delivered up to the registrar thereof, who must cause the ship to be registered anew.

By sect. 87, on failure of registry anew in the above cases, the ship is to be deemed not duly registered, and will no longer be recognized as a British ship.

By sect. 88, if upon any change of ownership in any ship the owner or owners desire to have the ship registered anew, although it is not required by the act, the registrar of the port at which she is already registered may, on the delivery up to him of the existing certificate of registry, and on the other requisites to registry or such of them as he thinks material being duly complied with, make the registry anew, and grant a certificate thereof.

By sect. 6 of the Merchant Shipping Act, 1873, where a ship has ceased to be registered as a British ship by reason of being wrecked or abandoned, or for any reason other than capture by the enemy or transfer to a person not qualified to own a British ship, such ship shall not be re-registered until she has, at the expense of the applicant for registration, been surveyed by one of the surveyors appointed by the Board of Trade, and certified by him to be seaworthy (z).

Sects. 89, 90, and 91 of the Merchant Shipping Act, 1854, and sect. 12 of the Merchant Shipping Act 1855, provide for the transfer of the registry of a ship from one port to another, upon

(z) As to the fees payable on such survey, see the M. S. Act, 1873, s. 30, the M. S. Act, 1876, s. 39, and Appendix, "Forms," No. 55.

the application of all the parties appearing on the register to be interested in her (a).

Until 1849 a vessel, in order to enjoy the privileges of a NATIONAL CHARACTER. British ship, must not only have been duly registered, but must also have been "navigated as such;" that is, by a master who was a British subject, and by a crew a certain proportion of which, varying as the ship was a foreign going or a coasting vessel, consisted of British seamen (b). There is now no statutory or other restriction on this head.

With respect to the national character and flag of British ships (c), the Merchant Shipping Act, 1854, provides by sect. 102, that officers of Customs may not grant a clearance or transire for any ship until the master has declared the name of the nation to which he claims that she belongs. This name the officer must inscribe on the clearance or transire, and he may detain the ship until this declaration is made.

By sect. 103 of the Merchant Shipping Act, 1854, if the British flag is used and the national character assumed on board a ship owned in whole or in part by any person not entitled to own British ships, for the purpose of making her appear to be a British ship, she becomes forfeited to the Queen, unless such assumption was made to escape capture by an enemy or by a foreign ship of war in exercise of some belligerent right (d). —improper assumption or concealment of.

The same section contains also the following provisions:—

If the master or owner of a British ship does or permits any thing to be done, or carries or permits to be carried any papers or documents, with intent to conceal the British character of his ship from any person entitled by British law to inquire into it,

(a) By sect. 98 of the M. S. Act, 1854, a power is given to the Commissioners of Customs, and to the governors of British possessions, to grant passes, under special circumstances, to British ships which have not been registered, so as to enable them to proceed from one place to another in the Queen's dominions. See also 31 & 32 Vict. c. 129, p. 20, note (a), and see p. 3, note (f).

(b) The 12 & 13 Vict. c. 29, ss. 7, 8, repealed in the first instance by the 16 & 17 Vict. c. 131, s. 31, and now repealed by the M. S. Repeal Act, 1854, which has also in part repealed the 16 & 17 Vict. c. 131.

(c) As to the national character of

ships generally, see Wildman on Search, Capture, and Prize, chap. iii.; *Reg. v. Anderson*, L. R., 1 C. C. R. 161; *Reg. v. Sven Seberg*, L. R., 1 C. C. R. 264; *Reg. v. Keyn*, 2 Ex. D. 63; The Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73.

(d) In any proceeding for enforcing a forfeiture under this section, the burden of proving a title to use the British flag and assume the national character lies on the person using and assuming them. The M. S. Act, 1854, s. 103. As to merchant ships using the queen's colours without warrant from the Admiralty, see sect. 105. And see *Reg. v. Ewen*, 2 Jurist, N. S. 454.

or to assume a foreign character, or with intent to deceive any such person, the ship will be forfeited to the Queen; and the master, if he commits or is privy to the commission of the offence, is guilty of a misdemeanor (*e*).

If any unqualified person, except in the case of transmitted interests hereafter noticed (*f*), acquires as owner any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, such interest is forfeited to the Queen.

Any person who, on behalf of himself or any other person or body of persons, wilfully makes a false declaration touching his or their qualification to own British ships, or any shares therein, is guilty of a misdemeanor; and the ship or share, to the extent of the interest of the person making the declaration, and unless it is shown that he had no authority to make it, that of the parties on behalf of whom it is made, is forfeited to the Queen (*g*).

In order that the above provisions as to forfeitures may be carried into effect, any commissioned officer in the army or navy on full pay, British officers of Customs and British consular officers may seize and detain a ship which has, either wholly or as to any share therein, become subject to forfeiture as above, and bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having Admiralty jurisdiction in the Queen's dominions; and the Court may make such order in the case as it may think fit, and award to the officer bringing in the ship a portion of the proceeds of the sale of it (*h*).

Rights of
British ships.

We have next to consider what are the privileges and obligations of a British ship. The statutes which formerly conferred

(*e*) The effect of the commission of this offence is to immediately divest the property in the vessel out of its former owners and vest it in the Crown; so that a *bonâ fide* purchaser, without notice of the offence but subsequent thereto, acquires no title. *The Annandale*, 2 P. D. 179; *S. C.*, on appeal, 2 P. D. 218; see also *Wilkins v. Despard*, 5 T. R. 112.

(*f*) *Post*, p. 47.

(*g*) See also the M. S. Act, 1855, s. 9, *supra*, p. 18, note (*f*).

(*h*) By sect. 104, officers are not responsible, either civilly or criminally,

in respect of the seizure or detention of any ship that has been seized or detained by them, although it is not brought in for adjudication, or, if so brought in, is declared not to be liable to forfeiture, if it is shown to the satisfaction of the judge or Court that there were reasonable grounds for the seizure or detention; but if no such grounds are shown, the judge or Court may award payment of costs and damages to any party aggrieved, and make such other order in the premises as he or it thinks just.

in some cases a monopoly of trade to the exclusion of ships of other nations, and in others a right to a more favourable treatment with respect to duties levied by the British government, have been practically repealed. At present the peculiar rights of a British ship are substantially confined to the right of assuming the national character and flag, and of claiming the protection resulting therefrom (i). With respect to customs and other duties and charges, and to prohibitions or restrictions as to the voyages in which they may engage, foreign and British ships are now therefore placed on the same footing. If, however, other countries do not act with reciprocity in this respect, the Queen may, by order in council, impose such prohibitions or restrictions as to the voyages to British dominions in which foreign ships may engage, and such additional duties or charges on them or their cargoes, as will place them in the same position here as that occupied by our ships in the ports of the country to which the foreign vessels belong (j).

Privileges of
Foreign ships.

(i) The various prohibitions under which foreign shipping formerly laboured will be found in the repealed statutes, ending with the 8 & 9 Vict. c. 88, and the M. S. Repeal Act, 1854. The policy of these acts was principally directed against the importation into this country of merchandize except in British ships, or ships of the country of which it was the produce or manufacture. The coasting trade was wholly restricted to British ships until 1854, when, by the 17 & 18 Vict. c. 5, foreign ships were enabled to carry goods and passengers coastwise, and to and from the Channel Islands, and to do so upon the same terms with reference to dock, pier, harbour, light, pilotage, tonnage and other dues as British ships. See also the Harbours and Passing Tolls Act, 1861, 24 & 25 Vict. c. 47, s. 10. By sect. 141 of the Customs Laws Consolidation Act, 1876, 39 & 40 Vict. c. 36, it is provided that no foreign ship employed in the coasting trade shall, during the time she is so employed, be subject to any higher rates, dues, or other charges, or any rules as to the employment of pilots, or any other rates or restrictions whatsoever, than British ships employed in the coasting trade. A practical instance of the value of British registered ships above those of other nations under the old system will be found in the case of *Young v. Twing*, 2 M. & G. 593, where a vessel having struck on

the Goodwin Sands, her value as she lay was only 700*l.*, but two English witnesses stated, that if repaired and entitled to a British register, she would have been worth from 4,500*l.* to 4,700*l.*, and several Dutch witnesses said that she would be worth in Holland only from 2,080*l.* to 2,915*l.*

(j) The 16 & 17 Vict. c. 107, ss. 324, 325. This principle of reciprocity has long been known in our legislation, for chap. 30 of Magna Charta, 9 Hen. 3, after providing for the safe conduct of the merchants of countries in amity with us, directs, that "if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be intreated there in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us." A similar rule has been applied to foreign ships in cases of collision and salvage, by sects. 58 and 59 of the M. S. Act, 1862. See also the M. S. Act, 1876, s. 37. It is provided by sect. 106 of the M. S. Act, 1854, that whenever it is declared by that act that a ship belonging to persons qualified to be owners of British ships shall not be recognized as such, this means that the ship shall be deprived of the privileges and protection belonging to British ships, and of the

The 37th section of the Merchant Shipping Act, 1876, provides that whenever it has been made to appear to her Majesty that the government of any foreign state is desirous that any of the provisions of the Merchant Shipping Acts, 1854 to 1876, or of any act thereafter to be passed amending the same, shall apply to the ships of such state, her Majesty may by order in council declare that such of the said provisions as are in such order specified shall apply, and thereupon, so long as the order remains in force, such provisions shall apply to the ships of such state, and to the owners, masters, seamen, and apprentices of such ships, when not locally within the jurisdiction of such state, in the same manner in all respects as if such ships were British ships.

PROVISIONS AS
TO UNSEA-
WORTHY SHIPS.

The legislature has recently passed stringent measures to prevent ships being sent to sea in an unseaworthy state. The Merchant Shipping Act, 1876, which came into operation on the 1st October, 1876, contains the most important of these provisions (*k*).

The 4th section of the act enacts that every person who sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

Every master of a British ship who knowingly takes the same to sea in such unseaworthy state that the life of any person is likely to be thereby endangered shall be guilty of a misdemeanor, unless he proves that her going to sea in such un-

right to use the flag and assume the national character, but that the provision is not to affect the payment of dues, the liability to penalties, or the punishment of offences committed on board. The owner of a ship carrying the British flag, and engaged in the slave trade, was not allowed to prove, for the purpose of avoiding the condemnation of his ship, that he was not a British subject, and that the register

was void. *The Laura*, 3 Moo. P. C. (N. S.) 181.

(*k*) All the provisions of this act are subject to a saving clause contained in the 44th section, which enacts that nothing in the act shall apply to any vessel employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession.

seaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

A prosecution under this section shall not be instituted except by or with the consent of the Board of Trade, or of the governor of the British possession in which such prosecution takes place (*l*).

A misdemeanor under this section shall not be punishable upon summary conviction.

The 6th section provides, in substance, as follows:—Where ^{—detention of.} a British ship, being in any port of the United Kingdom, is, by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life (*m*), having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as “unsafe”) may be provisionally detained for the purpose of being surveyed, and either finally detained or released, as follows:—

- (1.) The Board of Trade, if they have reason to believe on complaint, or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed.
- (2.) When a ship has been provisionally detained there shall be forthwith served on the master of the ship (*n*) a written statement of the grounds of her detention, and the Board of Trade may, if they think fit, appoint some competent person or persons to survey the ship and report thereon to the Board (*o*).
- (3.) The Board of Trade on receiving the report may either order the ship to be released or, if in their opinion the ship is unsafe, may order her to be finally detained, either absolutely, or until the performance of such conditions with respect to the execution of repairs or

(*l*) It is provided by the 41st section that in the application of the act to Scotland this provision shall not apply.

(*m*) See the construction put on the same words in sect. 12 of the M. S. Act, 1873 (now repealed). *Lewis v. Gray*, L. R., 1 C. P. D. 452; *Reg. v. Freeman*, L. R., Irish, 9 C. L. 527; *Grausfelt v. Lord Advocate*, 1 Sess. Ca. 4th series, p. 782.

(*n*) Where there is no master the statement may be served on the man-

aging owner, or on some agent of the owner, or where no such agent can be found, service may be effected by affixing the statement to the mast of the ship: sect. 35. The same section contains other provisions respecting service.

(*o*) As to the fees for such survey, see the M. S. Act, 1873, s. 30, the M. S. Act, 1876, s. 39, and Appendix, “Forms,” No. 55.

alterations, or the unloading or reloading of cargo, as the Board think necessary for the protection of human life, and may from time to time vary or add to any such order.

- (4.) Before the order for final detention is made a copy of the report shall be served upon the master of the ship, and within seven days after such service the owner or master of the ship may appeal in the prescribed manner to the court of survey for the port or district.
- (5.) Where a ship has been provisionally detained, the owner or master of the ship, at any time before the person appointed under this section to survey the ship makes such survey, may require that he shall be accompanied by such person as the owner or master may select out of the list of assessors for the court of survey, and in such case if the surveyor and assessor agree, the Board of Trade shall cause the ship to be detained or released accordingly, but if they differ, the Board of Trade may act as if the requisition had not been made, and the owner and master shall have the like appeal touching the report of the surveyor as is before provided.
- (6.) Where a ship has been provisionally detained, the Board of Trade may at any time, if they think it expedient, refer the matter to the court of survey.
- (7.) The Board of Trade may at any time, if satisfied that a ship detained under this act is not unsafe, order her to be released either upon or without any conditions.
- (8.) For the better execution of this section, the Board of Trade, with the consent of the Treasury, may from time to time appoint a sufficient number of fit officers, and may remove any of them.
- (9.) Any officer so appointed (in this act referred to as a detaining officer) shall have the same power as the Board of Trade have under this section of provisionally ordering the detention of a ship for the purpose of being surveyed, and of appointing a person or persons to survey her; and if he thinks that a ship so detained by him is not unsafe may order her to be released (p).

(p) The 12th section enacts that—
 “(1) A detaining officer shall have for the purpose of his duties the same

powers as an inspector appointed by the Board of Trade under the Merchant Shipping Act, 1854;

- (10.) A detaining officer shall forthwith report to the Board of Trade any order made by him for the detention or release of a ship (q).

The 34th section contains the following provisions:—Where under the Merchant Shipping Acts, 1854 to 1876, or any of them, a ship is authorized or ordered to be detained, any commissioned officer on full pay in the naval or military service of her Majesty, or any officer of the Board of Trade or customs, or any British consular officer may detain the ship, and if the ship after such detention or after service on the master of any notice of or order for such detention proceeds to sea before it is released by competent authority, the master of the ship, and also the owner, and any person who sends the ship to sea, if such owner or person be party or privy to the offence, shall forfeit and pay to her Majesty a penalty not exceeding 100*l*.

Where a ship so proceeding to sea takes to sea when on board thereof in the execution of his duty any officer authorized to detain the ship, or any surveyor or officer of the Board of Trade or customs, the owner and master of the ship shall each be liable to pay all expenses incidental to the officer or surveyor being so taken to sea, and also a penalty not exceeding 100*l*., or, if the offence is not prosecuted in a summary manner, not exceeding 10*l*. for every day until the officer or surveyor returns, or until such time as would enable him after leaving the ship to return to the port from which he is taken, and such expenses may be recovered in like manner as the penalty.

The 7th section enacts that a court of survey for a port or district shall consist of a judge sitting with two assessors (r).

(See section 16 of the Act of 1854.)

"(2) An order for the detention of a ship, provisional or final, and an order varying the same, shall be served as soon as may be on the master of the ship; (See sect. 35.)

"(3) When a ship has been detained under this act she shall not be released by reason of her British register being subsequently closed;

"(4) For the purposes of a survey of a ship under this act any person authorized to make the same may go on board the ship and inspect the same and every part thereof, and the machinery, equipments and cargo, and may require the unloading or removal of any cargo,

ballast or tackle;

"(5) The provisions of the Merchant Shipping Act, 1854, with respect to persons who wilfully impede an inspector, or disobey a requisition or order of an inspector, shall apply as if those provisions were herein enacted, with the substitution for the inspector of any judge, assessor, officer, or surveyor who under this Act has the same powers as an inspector or has authority to survey a ship." (See sects. 13 and 16 of the Act of 1854.)

(q) See note (p) *supra*, p. 32.

(r) The 7th section further provides, that the judge shall be such person as may be summoned for the case in ac-

Power and
procedure of
court of
survey.

With respect to the court of survey the following provisions are made by the 8th section :—

- (1.) The case shall be heard in open court;
- (2.) The judge and each assessor may survey the ship, and shall have for the purposes of this act all the powers of an inspector appointed by the Board of Trade under the Merchant Shipping Act, 1854 (g) ;
- (3.) The judge may appoint any competent person or persons to survey the ship and report thereon to the Court;
- (4.) The judge shall have the same power as the Board of Trade have to order the ship to be released or finally

accordance with the rules made under the act, out of a list (from time to time approved for the port or district by one of her Majesty's principal secretaries of state) of wreck commissioners appointed under the act, stipendiary or metropolitan police magistrates, judges of county courts, and other fit persons; but in any special case in which the Board of Trade think it expedient to appoint a wreck commissioner, the judge shall be such wreck commissioner. The assessors shall be persons of nautical engineering or other special skill and experience; one of them shall be appointed by the Board of Trade, either generally or in each case, and the other shall be summoned in accordance with the rules under the act by the registrar of the court, out of a list of persons periodically nominated for the purpose by the local marine board of the port, or, if there is no such board, by a body of local shipowners or merchants approved for the purpose by a secretary of state, or, if there is no such list, shall be appointed by the judge; if a secretary of state thinks fit at any time, on the recommendation of the government of any British possession or any foreign state, to add any person or persons to any such list, such person or persons shall, until otherwise directed by the secretary of state, be added to such list, and if there is no such list shall form such list.

The county court registrar or such other fit person as a secretary of state may from time to time appoint shall be the registrar of the court, and shall, on receiving notice of an appeal or a reference from the Board of Trade, immediately summon the court to meet forthwith.

The 41st, 42nd and 43rd sections

provide that in the application of the act to Scotland—

“Judge of a county court” shall include a sheriff and sheriff substitute, and

“Registrar of a county court” shall include sheriff clerk, and

“A master of the Supreme Court of Judicature” shall mean the Queen's and Lord Treasurer's Remembrancer.

In the application of the act to Ireland—

“Judge of a county court” shall include “chairman of a county” and “the recorder of any borough”;

“Registrar of a county court” shall include the clerk of the peace or registrar or other person discharging the duties of registrar of the court, of the chairman of a county, or the recorder of a borough;

“Stipendiary magistrate” shall include any of the justices of the peace in Dublin metropolis and any resident magistrate; and

“A master of the Supreme Court of Judicature” shall mean one of the masters of the Superior Courts of Common Law in Ireland.

In the application of the act to the Isle of Man—

“Judge of a county court” shall mean the water bailiff;

“Stipendiary magistrate” shall mean a high bailiff;

“Registrar of a county court” shall mean a clerk to a deemster or a clerk to justices of the peace;

“A master of the Supreme Court of Judicature” shall mean the clerk of the rolls.

(g) The M. S. Act, 1854, s. 15.

detained, but unless one of the assessors concurs in an order for the detention of the ship, the ship shall be released;

- (5.) The owner and master of the ship and any person appointed by the owner or master, and also any person appointed by the Board of Trade, may attend at any inspection or survey made in pursuance of this section;
- (6.) The judge shall send to the Board of Trade the prescribed report, and each assessor shall either sign the report or report to the Board of Trade the reasons for his dissent.

The 15th section empowers the Board of Trade, if they are of opinion that an appeal under the act involves a question of construction or design, or of scientific difficulty or important principle, to refer the matter to such one or more out of a list of scientific referees approved by a Secretary of State, as may appear to possess the special qualifications necessary for the particular case, and may be selected by agreement between the Board of Trade and the appellant, or in default of any such agreement by a Secretary of State; and provides that thereupon the appeal shall be determined by the referee or referees, instead of by the Court of Survey.

The Board of Trade, if the appellant in any appeal so require and give security to the satisfaction of the Board to pay the costs of and incidental to the reference, shall refer that appeal to a referee or referees so selected as aforesaid.

The referee or referees have the same powers as a judge of the Court of Survey.

The 9th section enables the Lord Chancellor to make general rules to carry into effect the provisions of the act, and provides that all such rules shall have effect as if enacted in the act (r).

The 10th section enacts that if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship (s) his costs of the detention and survey, Liability for costs and damages caused by detention.

(r) The rules now in force are printed in the Appendix, "Forms," Nos. 53 and 53A.

(s) By the 13th section of the Act of 1873, which is repealed by the Act of 1876, the Board of Trade were

liable to pay compensation to any person for loss, &c. The enactments now in force seem to be confined to loss sustained by the shipowner, and the owners of cargo or passengers suffering loss seem to be without remedy.

and also compensation for any loss sustained by him by reason of the detention. If a ship is finally detained under the act, or if it appears that a ship provisionally detained was, at the time of such detention, unsafe within the meaning of the act, the owner of the ship shall be liable to pay to the Board of Trade their costs of the detention and survey, and those costs shall, without prejudice to any other remedy, be recoverable as salvage is recoverable. This section contains also further provisions as to costs, and the proceedings for the recovery of the same.

The 11th section provides that where a complaint is made to the Board of Trade or a detaining officer that a British ship is unsafe, the Board or officer may require the complainant to give security to the satisfaction of the Board for the costs and compensation which he may become liable to pay as thereafter mentioned :

Provided that where the complaint is made by one-fourth, being not less than three, of the seamen belonging to the ship, and is not in the opinion of the Board or officer frivolous or vexatious, such security shall not be required, and the Board or officer shall, if the complaint is made in sufficient time before the sailing of the ship, take proper steps for ascertaining whether the ship ought to be detained under this act.

Where a ship is detained in consequence of any complaint, and the circumstances are such that the Board of Trade are liable under this act to pay to the owner of the ship any costs or compensation, the complainant shall be liable to pay to the Board of Trade all such costs and compensation as the Board incur or are liable to pay in respect of the detention and survey.

Application to
foreign ships
of provisions
as to deten-
tion.

The 13th section contains the following provisions :—Where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is whilst at that port unsafe by reason of overloading or improper loading, the provisions of this act with respect to the detention of ships shall apply to that foreign ship as if she were a British ship, with the following modifications :

- (1.) A copy of the order for the provisional detention of the ship shall be forthwith served on the consular officer (†)

(†) Defined by the same section to mean any consul-general, vice-consul, consular agent, or other officer recog-

nized by a secretary of state as a consular officer of a foreign state.

for the state to which the ship belongs at or nearest to the place where the ship is detained ;

- (2.) Where a ship has been provisionally detained, the consular officer, on the request of the owner or master of the ship, may require that the person appointed by the Board of Trade to survey the ship shall be accompanied by such person as the consular officer may select, and in such case, if the surveyor and such person agree, the Board of Trade shall cause the ship to be detained or released accordingly, but if they differ, the Board of Trade may act as if the requisition had not been made, and the owner and master shall have the appeal to the Court of Survey touching the report of the surveyor which is before provided by this Act ; and
- (3.) Where the owner or master of the ship appeals to the Court of Survey, the consular officer, on the request of such owner or master, may appoint any competent person who shall be assessor in such case in lieu of the assessor who, if the ship were a British ship, would be appointed otherwise than by the Board of Trade.

Section 22 contained provisions with regard to the mode in which cargoes consisting of grain, corn, rice, paddy, pulse, seeds, nuts or nut kernels, described as "grain cargoes," should be carried and stowed. This section, except as to penalties already incurred, is repealed by the Merchant Shipping (Carriage of Grain) Act (43 & 44 Vict. c. 43 (u)), which contains more minute provisions of a similar character as to the precautions which should be taken to prevent grain cargoes laden on British ships from shifting, having reference to the ports where they are shipped. Grain cargoes.

Section 24 of the Merchant Shipping Act, 1876, provides that if a ship, British or foreign, arrives between the last day of October and the 16th April in any year (v) at any port in the United Kingdom from any port out of the United Kingdom, carrying as deck cargo, that is, in any uncovered space upon Deck cargoes of wood.

(u) This statute will be found in the Appendix, p. cccxxx. See also the official notices issued by the Board of Trade thereunder, Parl. Paper, No. 95, sess. 1881, H. C. By sect. 8, officers having authority from the Board of

Trade have the same powers under the Act as inspectors under the M. S. Act, 1854. As to penalties and offences, see ss. 7, 9, 10.

(v) After the 1st day of Nov. 1876.

deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, any wood goods coming within the following descriptions:—

- (a.) Any square, round, waney, or other timber, or any pitch pine, mahogany, oak, teak, or other heavy wood goods whatever; or
- (b.) Any more than five spare spars or store spars, whether or not made, dressed, and finally prepared for use; or
- (c.) Any deals, battens, or other light wood goods of any description to a height exceeding three feet above the deck;

the master of the ship, and also the owner, if he is privy to the offence, is liable to a penalty not exceeding 5*l.* for every hundred cubic feet of wood goods carried in contravention of this section, and such penalty may be recovered by action or on indictment or to an amount not exceeding 100*l.* (whatever may be the maximum penalty recoverable) on summary conviction.

Provided that a master or owner shall not be liable to any penalty under this section—

- (1.) In respect of any wood goods which the master has considered it necessary to place or keep on deck during the voyage on account of the springing of any leak, or of any other damage to the ship received or apprehended; or
- (2.) If he proves that the ship sailed from the port at which the wood goods were loaded as deck cargo at such time before the last day of October as allowed a sufficient interval according to the ordinary duration of the voyage for the ship to arrive before that day at the said port in the United Kingdom, but was prevented from so arriving by stress of weather or circumstances beyond his control; or
- (3.) If he proves that the ship sailed from the port at which the wood goods were loaded as deck cargo at such time before the 16th day of April as allowed a reasonable interval according to the ordinary duration of the voyage for the ship to arrive after that day at the said port in the United Kingdom, and by reason of an exceptionally favourable voyage arrived before that day.

Provided further, that nothing in this section shall affect any ship not bound to any port in the United Kingdom which comes into any port of the United Kingdom under stress of weather,

or for repairs, or for any other purpose than the delivery of her cargo.

By virtue of the provisions of the 25th section of the Merchant Shipping Act, 1862, and of an Order in Council made in pursuance thereof, regulations are made concerning lights and fog signals^(u). These regulations will be considered hereafter: it is only necessary here to observe that by the 30th section of the Merchant Shipping Act, 1862, power is given to surveyors^(v) appointed by the Board of Trade to inspect ships for the purpose of seeing that they are properly provided with lights and with the means of making fog signals; and if any such surveyor finds any ship not so provided he may give to the master notice in writing pointing out the deficiency, and also what is in his opinion requisite in order to remedy the same. Every notice so given is to be communicated to the collector of customs at any port from which such ship may seek to clear, and no collector to whom such communication is made shall clear such ship outwards, or allow her to proceed to sea, without a certificate under the hand of one of the said surveyors to the effect that the said ship is properly provided with lights and with the means of making fog signals in pursuance of the said regulations^(x).

Inspection of
lights and
signals.

Complaints having been made that this power of detaining ships was in some cases vexatiously exercised by the surveyors, the 14th section of the Merchant Shipping Act, 1876, provides that if a shipowner feels aggrieved by the refusal of a certificate as to lights or fog signals, he may appeal to the Court of Survey. But as this right of appeal relates also to the refusal of surveyors to grant declarations for passenger steamers under the M. S. Act, 1854, and certificates of clearance under the Passenger Acts, the mode of procedure will be more conveniently considered hereinafter in the chapter relating to passengers.

Having considered in their order the registry, navigation, privileges and national character of British ships, we will now

TITLE TO
BRITISH SHIPS.

(u) See Appendix, "Orders in Council," Navigation Rules.

(v) By the 13th sect. of the M. S. Act, 1872, all duties in relation to the survey and measurement of ships under that act, or the acts amended thereby, are to be performed by the surveyors appointed under the 4th part of the act of 1854, in accordance with the regula-

tions of the Board of Trade.

(x) As to the fees to be paid with respect to the survey and measurement of ships under the M. S. Acts, 1854 to 1876, see the M. S. Amendment Act, 1873, s. 30, Sched. III. and Appendix, "Forms," No. 55; and the M. S. Act, 1876, s. 39, as to the mode of payment of such fees.

inquire how a title to them, whether absolute or limited, may be acquired; dealing with the subject under the heads of *Sale*, *Mortgage* and *Capture* (*y*).

SALE.

There being no market overt for ships (*z*), a sale to confer a good title must be by the authority of one who has a good title himself. We shall see in another chapter in what cases the master has authority to sell (*a*).

Where a foreign ship is sent over to this country for sale, and is sold here, the rights of the parties under the contract of sale must be determined by the law of this country, although in the determination of those rights regard will be paid to the law of the foreign country in order to ascertain what was the position of the parties under that law prior to the contract of sale (*b*).

By Court of
Admiralty
and Courts
abroad.

The Admiralty Division of the High Court of Justice possesses jurisdiction in many cases to order a ship to be sold, and in such cases the power of the Court to sell and thereby to confer a good title is indisputable (*c*). Sales sometimes occur by order of a British Admiralty Court abroad, when a vessel has been surveyed and condemned as unfit for service (*d*).

A doubt was at one time raised whether the Courts of this country would treat as valid the sale of a ship in a foreign country, ordered by a Court of competent jurisdiction there, under circumstances such as would not according to English

(*y*) It will be found that the following observations apply, to a certain extent, to all ships.

(*z*) See *per* Turner, L. J., *Hooper v. Gumm*, L. R., 2 Ch. 290.

(*a*) See *post*, Chap. III., Master.

(*b*) *Hooper v. Gumm*, L. R., 2 Ch. 282.

(*c*) See the 3 & 4 Vict. c. 65, and the Admiralty Court Act, 1861 (24 Vict. c. 10). In certain cases other Divisions of the High Court possess similar powers. See, also, the Supreme Court of Judicature Act, 1873, s. 42; the Supreme Court of Judicature Act, 1875, Order V. sect. 2, rule 4.

(*d*) Where such a sale has proceeded merely upon the petition of the master, not under circumstances of stringent necessity, the Courts of this country have refused to recognise the validity of the sale; *Reid v. Darby*, 10 East, 143; *Morris v. Robinson*, 3 B. & C. 196. In

the latter case it did not appear that the Vice Admiralty Court had any jurisdiction to make the decree in question. In a case in the English Court of Admiralty, however, where such a sale had taken place at the Mauritius, upon the petition of the master, and it was proved that he was not in possession of any funds to repair the ship, and that the owner's agent, who was not shown to have held any funds, had refused in any way to assist him, and it appeared that he had acted *bond fide* and with discretion throughout, the title of the purchaser was upheld; *The Warrior*, 2 Dods. 288. See *The Elicia Cornish*, 1 Spk. 36; *The Cobeguid Marine Insurance Company v. Barteaux*, L. R., 6 P. C. 319; *Acates v. Burns*, 3 Ex. D. 282. The authority of the master to sell in circumstances of stringent necessity is considered *post*, Chap. III.

law confer authority to sell the ship (e). But it seems now to be established that where a ship in a foreign country (or her cargo) has been sold by the order of a Court there of competent jurisdiction, the sale must, in the absence of fraud, be regarded as valid (f). In some cases a distinction has been drawn between a sale ordered in the course of proceedings *in personam*, and a sale ordered in the course of proceedings *in rem*; but it is apprehended that the principle of the recent decisions bearing upon this question rests not upon any matter of form, but upon the broad ground that if property is disposed of without fraud in a manner binding by the law of the country where the property is, such a disposition is binding everywhere. The rule is thus expressed by Mr. Justice Blackburn, in delivering the opinion of the judges, in the case of *Castrique v. Imrie* (g): "We think the inquiry is first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and secondly, whether the sovereign authority of that state has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive." The true foundation for the jurisdiction in such cases seems to be that everyone is supposed to give to the state under whose protection he places his property jurisdiction over that property (h).

(e) See *Simpson v. Fogo*, 32 L. J., Ch. 249; 1 H. & M. 195; the judgment of Byles, J., in *Cammell v. Sewell*, 3 H. & N. 617, and the cases there cited. See also *Liverpool Marine Credit Co. v. Hunter*, L. R., 4 Eq. 62; 3 Ch. 479.

(f) *Cammell v. Sewell*, 3 H. & N. 617; *S. C.*, in error, 5 H. & N. 728; *Messina v. Petrocchino*, L. R., 4 P. C. 144. The judgment of course may be impeached on the ground of fraud; *Ochsenbein v. Papelier*, L. R., 8 Ch. 695. Whether it may be impeached on the ground that the foreign tribunal has knowingly and perversely disregarded the rights given to an English subject by English law, is a question which cannot be regarded as authoritatively settled. In a case where a defendant was sued in this country on a judgment obtained against him in an action *in personam*, instituted in a foreign tribunal, and it appeared upon the face of the proceedings that the judg-

ment proceeded upon a mistake as to English law, it was held by a majority of the judges that the foreign judgment could not be impeached; *Godard v. Gray*, L. R., 6 Q. B. 139. The judgment of the Common Pleas Division in the more recent case of *Meyer v. Ralli*, 1 C. P. D. 358, may appear to modify to some extent the law as laid down in *Godard v. Gray*. The judgment in the latter case, however, treats the sale of the ship and cargo as a valid sale, but as it was admitted that the sale included a portion of the cargo, which it was the duty of the master to have trans-shipped and forwarded, the Court held that it could not affect the right of the owner as against his underwriter, by making that a total loss, which apart from the sale was clearly not a total loss.

(g) L. R., 4 H. L. 414, at page 429.

(h) See Wharton on the Conflict of Laws, sect. 800. But it seems the jurisdiction thus conferred does not

By private
persons.

Bill of sale.

It is scarcely necessary to observe that ships are personal property; like other goods and chattels, therefore, they pass to the executors of a deceased owner, and, except where the Registry Acts have made certain formalities essential to their sale, the property in them would, subject to the operation of the Statute of Frauds, pass by a contract of immediate sale (*i*), or by an agreement to be completed *in futuro*, coupled with delivery. Ships, however, from their great value, and frequent absence from port (*k*), have for so long a period been conveyed by a formal instrument known as a bill of sale, that, although the contracts mentioned above would convey sufficient property to the vendee to enable him to maintain trover against a wrongdoer (*l*) (since mere possession is *prima facie* evidence of ownership (*m*)), yet it has been doubted whether, even at common law, such a sale would be valid, without the more solemn conveyance by the bill of sale (*n*). However this may be, a bill of sale is the universal instrument of transfer in all countries, and is the proper title to which a maritime Court looks (*o*); and where a ship was sold whilst at sea, a delivery of the grand bill of sale was held, before the present system of registration, to amount to a delivery of the ship herself (*p*).

Bills of sale were formerly spoken of as of two kinds. 1. The grand bill of sale, which conveyed the ship from the builder to the owner, or first purchaser; and, 2, the ordinary bill of sale, by which any subsequent transfer was made. Now, however, the term grand bill of sale is never used, and the builder's certificate is commonly the only document delivered by the builder to the first purchaser as evidence of his title (*q*). No stamp duty is payable on bills of sale, assignments or other conveyances of ships (*r*).

extend beyond the property. See the judgment of Blackburn, J., in *Schibaby v. Westenholz*, L. R., 6 Q. B. at page 158. See also Phillimore's *International Law*, vol. 4, DCCCXLVI; Story's *Conflict of Laws*, s. 607; *Copin v. Adamson*, L. R., 9 Ex. 345, on appeal, 1 Ex. D. 17.

(*i*) *Tarling v. Baxter*, 6 B. & C. 360, and *per Wood, B.*, in *Hubbard v. Johnstone*, 3 Taunt. 205. *Per Parke, J.*, *Dixon v. Yates*, 5 B. & Ad. 340.

(*k*) Being invented "to plow the seas, not to lie by the walls." *Molloy*, B. 2, c. 1, s. 2.

(*l*) *Sutton v. Buck*, 2 Taunt. 302.

(*m*) *Robertson v. French*, 4 East, 130; *Amery v. Rogers*, 1 Esp. 207; *Thomas v. Foyle*, 5 Esp. 88; *Pirie v. Anderson*, 4 Taunt. 652.

(*n*) See Abbott on Shipping, p. 2.

(*o*) *Per Sir W. Scott*, in *The Sisters*, 5 Rob. 159. In *The Eliza Cornish*, 17 Jur. 738; *S. C.*, 1 Spinks, 36, Dr. Lushington said, "ships in general cannot be sold save by an instrument in writing."

(*p*) *Atkinson v. Maling*, 2 T. R. 462.

(*q*) See *supra*, p. 18.

(*r*) The 6 Geo. 4, c. 41; the M. S. Act, 1854, s. 9; and the 33 & 34 Vict. c. 97, s. 3, and Schedule.

The Merchant Shipping Act, 1854, provides by sect. 55, that a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, which must contain the same description of the ship as is in the certificate of the surveyor (s), or such other description as may be sufficient to identify her to the satisfaction of the registrar, and must be in the prescribed form (t), or as near thereto as circumstances permit, and must be executed by the transferor in the presence of and be attested by one or more witnesses (u).

(s) See *ante*, p. 7, n. (g).

(t) With respect to the form of bills of sale and mortgages, the Commissioners of Customs, in their instructions to registrars, sect. 64, say, "the registrars will advise parties interested, that so far as relates to the dealings with, and the title to, the ship, no advantage whatever can be gained by the use of longer or more cumbrous instruments. If there are collateral arrangements between the parties they should be carried into effect by separate instruments." Where a warranty is entered into on the sale of a ship, it is not necessary that the warranty should appear on the face of the bill of sale; *Stuckley v. Baily*, 3 F. & F. 1; 1 H. & C. 406; 31 L. J., Ex. 483. See *Chapman v. Callie*, 9 C. B., N. S. 769; 30 L. J., C. P. 241.

(u) For the form now in use see Appendix, "Forms," No. 10. It will be observed, that the bill of sale is now under seal. By the 8 & 9 Vict. c. 89, s. 34, it was provided, that British registered ships should be transferred "by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof," otherwise such transfer should "not be valid or effectual for any purpose whatever either in law or in equity." These words were held to apply to an executory contract, as well as to an absolute sale; therefore an unregistered contract for the sale of shares in a British ship could not be enforced in equity; *Hughes v. Morris*, 2 De G., M. & G. 349; *McCalmont v. Rankin*, 2 De G., M. & G. 403; and this was so even against a purchaser, with notice of the prior sale; *Coombes v. Mansfield*, 3 Drew. 193, in which case it was said, that the operation of the Ship Registry Acts precluded any applica-

tion of the equitable doctrine of notice. Neither would any action lie for the breach of such a contract; *Duncan v. Tindall*, 13 C. B. 258; nor could equity afford relief even where the purchaser of a ship fraudulently took away the bill of sale and got it registered without having paid the purchase-money; *Follett v. Delany*, 2 De G. & Sm. 235. By the 8 & 9 Vict. c. 89, s. 37, it was provided, that no bill of sale or other instrument should be valid and effectual to pass the property in any ship or share, or for any other purpose, until it had been produced to the collector, and he had entered certain particulars in the book of registry. Under this section it was held, that a mortgage not registered was inoperative; *Parr v. Applebee*, 7 De G., M. & G. 585; although it seems that a contract relating only to the produce of a sale of a ship would be enforced; *Id.* and *Armstrong v. Armstrong*, 21 Beav. 78. Accordingly the registration had no effect by relation, so as to defeat the title of assignees of a bankrupt mortgagor accruing subsequently to the execution of the bill of sale, but previously to the registration. In truth, the bill of sale was not in legal existence until registered; *Boysen v. Gibbon*, 4 C. B. 121, decided upon the corresponding sections of the 3 & 4 Will. 4, c. 55. The old Registry Act, 34 Geo. 3, c. 68, s. 15, after directing that the indorsement should be made, enacted that, "otherwise such sale or contract, or agreement for sale, shall be utterly null and void to all intents and purposes whatsoever." Upon this section it was held that the transfer of a ship at sea vested the property in the vendee, subject only to be divested by the neglect of the vendor to make the indorsement within the proper time, and that although a bankruptcy intervened before the arrival of the

Requirements
of M. S. Act
on sale.

By the 11th sect. of the Merchant Shipping Act, 1855, it is provided, that if any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship or share or interest therein is made in any form or contains any particulars other than those prescribed and approved by the Merchant Shipping Act, 1854, no registrar shall be required to record it without the express direction of the Commissioners of Customs. But a contract which fails to observe the requirements of the statutes will be valid and will create equitable rights between the parties to it. Thus the property in a ship may pass as between a vendor and vendee by an unregistered bill of sale (u).

Declaration
by transferee

It is provided by sect. 56 of the Merchant Shipping Act, 1854, that, before a person can be registered as transferee of a ship, he must make a declaration in a prescribed form, stating his qualification to be registered as owner of a share in a British ship, and containing a denial similar to that made by an original owner (c). In the case of a transfer to a corporation, the secretary, or other duly appointed public officer, must make a declaration in the prescribed form (x), stating the name of the corporation, and such circumstances of its constitution and business as may prove it to be qualified to own a British ship, and containing a denial similar to that contained in a declaration of ownership made on behalf of a body corporate. In the case of an individual, this declaration must be made, if he reside within five miles of the custom house of the port of registry, in the presence of the registrar, but if beyond that distance, it may be made in the presence of any registrar or of any justice of the peace. In the case of a body corporate the declaration must be made in the presence of the registrar of the port of registry.

ship, the indorsement, being only an act of duty on behalf of the vendor, and passing no interest, might be made by the bankrupt; *Dixon v. Ewart*, 3 Mer. 322; *Hubbard v. Johnstone*, 3 Taunt. 177; *Palmer v. Moxon*, 2 M. & S. 43. See also *Moss v. Charnock*, 2 East, 399, and the remarks on those cases in the judgment in *Boyson v. Gibson*, *ubi sup.* Upon some of the earlier acts it was held, that the omission on the part of the officer to make the entry in his book would not invalidate the transfer. See *Ratchford v. Meadows*, 3 Esp. 69; *Heath v. Hubbard*, 4 East, 110; *Thompson v. Smith*, 1 Madd. 413, *per* Sir Thomas Plumer,

V.-C. In *Coombes v. Mansfield*, 3 Drew. 193, Kindersley, V.-C., refused, when a ship had been registered by the proper authority, to inquire whether the registry ought to have been effected, and said, it must be assumed that the registration was regular and valid. See also *Benham v. Keane*, 31 L. J., Chanc. 134.

(u) *Stapleton v. Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170. See *The Spirit of the Ocean*, Br. & Lush. 336; *The M. S. Act*, 1862, s. 3. See *post*, p. 56.

(v) For the forms now in use, see Appendix, "Forms," Nos. 2-7.

(x) See Appendix, "Forms," No. 8.

By sect. 57, every bill of sale for the transfer of a registered ship, or of any share therein, must, when duly executed, be produced to the registrar of the port at which she is registered, together with the transferee's declaration; and the registrar is to enter in the register book the name of the transferee as owner of the ship or share comprised in the bill of sale, and indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof. Bills of sale must be entered in the register book in the order of their production to the registrar (y).

Entry in
register book.

The Registry Act, 8 & 9 Vict. c. 89 (now repealed), contained special provisions to meet the case of several transfers by sale of the same ship or shares, under which provisions priority was given to the vendees, not according to the order in which their bills of sale were entered in the registry book, but according to the time when the indorsement of the particulars of the bills of sale was made on the certificate of registry (z). These provisions are omitted in the statute now in force. The certificate of registry is no longer the essential evidence of title, and the priority of vendees appears to depend, although the statute does not declare this in terms, upon the order in which the bills of sale are entered by the registrar in the register book which has just been mentioned.

Before the passing of the Merchant Shipping Act, 1854, it was held that the Ship Registry Acts applied only to transfers made by the acts of the parties, and not to those effected by operation of law, such as the vesting in the assignees of a bankrupt (a), or the transfer from a testator to his executor, or to the next of kin, or to residuary legatees (b). But by the 58th section of the Merchant Shipping Act, 1854, it is provided, that if the property in a ship or share becomes transmitted in consequence of the death, bankruptcy or insolvency of a registered owner, or the marriage of a female registered owner, or by any lawful means other than by a transfer ac-

TRANSFERRED BY
OPERATION OF
LAW.

This does not apply to a judgment to be sent to the register book. The purchaser must have a bill of sale. Chatterman v. Coppage 7 A. & P. C. 127.

(y) The present act for the first time requires the date of the entry to be indorsed on the bill of sale. The 8 & 9 Vict. c. 89, required the date of the production of the bill of sale to be entered. See as to this, *R. v. Philp*, 1 Moody, C. C. 263. Sect. 61 of the M. S. Act, 1854, provides, that of the documents required to be produced to the

registrar he is to retain in his possession the surveyor's certificate, the builder's certificate, the copy of the condemnation, and all declarations of ownership.

(z) The 8 & 9 Vict. c. 89, ss. 38 to 41.

(a) *Blaxam v. Hubbard*, 5 East, 407.

(b) *Per Lord Eldon*, in *Ex parte Yallop*, 16 Ves. 68.

According to the provisions of the act, the transmission must be authenticated by a declaration of the person to whom the property has been transmitted, made in the prescribed form (c), and containing the several statements hereinbefore required to be contained in the declaration of a transferee, or as near thereto as circumstances permit, and, in addition, a statement describing the manner in which and the party to whom such property has been transmitted. The declaration must be made and subscribed, if the declarant resides at or within five miles of the custom house of the port of registry, in the presence of the registrar, but if beyond that distance, in the presence of any registrar or of any justice of the peace.

Evidence of title to be produced to registrar.

By sect. 59 of the Merchant Shipping Act, 1854, if such transmission has taken place by virtue of the bankruptcy or insolvency of a registered owner, the declaration must be accompanied by such evidence as may for the time being be receivable in courts of justice as proof of the title of parties claiming under any bankruptcy or insolvency; and if the transmission has taken place by virtue of the marriage of a female owner, the declaration must be accompanied by a copy of the register of such marriage or by other legal evidence of its celebration, and must declare the identity of the female owner. If the transmission has taken place by virtue of any testamentary instrument, or by intestacy, then in England, Wales and Ireland the declaration must be accompanied by the probate of the will or the letters of administration, or an official extract therefrom, and in Scotland, or in any British possession, by the will, or any copy thereof that may be evidence by the laws of Scotland, or of such possession, or by letters of administration, or any copy thereof, or by such other document as may by the laws of Scotland, or of such possession, be receivable in the courts of judicature thereof as proof of the person entitled upon an intestacy.

By sect. 60, the registrar, upon the receipt of the declaration so accompanied as above, must enter the name of the person or persons entitled under such transmission in the register book as owner or owners of the ship or share therein in respect of which the transmission has taken place; and such persons, if more than one, must, however numerous they are, be considered as

(c) See Appendix, "Forms," Nos. 13, 14, 15.

one person only as regards the rule relating to the number of persons entitled to be registered as owners (*d*).

By sect. 62, whenever any property in a ship or share in a ship becomes vested by transmission, on the death of any owner or on the marriage of any female owner, in any person not qualified to be the owner of a British ship, if such ship is registered in England or Ireland, the Court of Chancery, and if in Scotland, the Court of Session, and if in any British possession, the Court possessing the principal civil jurisdiction within such possession, may, upon an application made by or on behalf of such unqualified person, order a sale to be made of the property so transmitted, and direct the proceeds thereof, after deducting expenses, to be paid to the person entitled under such transmission, or otherwise as the Court may direct. Such Court may also make or refuse an order for sale, and annex thereto, any terms or conditions, and require any evidence in support of the application it may think fit, and generally may act in the premises as the justice of the case requires.

Provisions for sale where property vests in person not qualified.

By sect. 63, every such order for a sale must contain a declaration vesting the right to transfer the ship or share so to be sold in some person or persons named by the Court, and such nominee or nominees are thereupon entitled to transfer the ship or share in the same manner, and to the same extent, as if he or they were the registered owner or owners. The registrar must obey the requisition of the nominee, in respect of any transfer, to the same extent as he would be compellable to obey the requisition of a registered owner.

By sect. 64, an application for sale, as above, must be made within four weeks after the occurrence of the event on which the transmission has taken place, or within such further time as the Court allows; such time must not, however, in any case exceed the space of one year from the date of the occurrence. In the event of no such application being made within this period, or of the Court refusing to accede to it, the ship becomes forfeited, as in the case of unqualified owners using a British flag and assuming the British character (*e*).

By sect. 65, the Courts already mentioned may, without prejudice to their other powers, upon the summary application of any interested person made by petition or otherwise, and either

(*d*) See this rule, *ante*, p. 17.

(*e*) See as to this, *ante*, p. 27.

ex parte or upon service of notice, as the Court may direct, issue an order, prohibiting for a time named in the order any dealing with a ship or share. The Court may also make or refuse the order, and annex thereto any terms or conditions, and discharge the order when granted with or without costs, and generally may act as the justice of the case requires; and every registrar must upon being served with such order, or an official copy thereof, obey the same without being made a party to the proceedings (*d*).

By the Admiralty Court Act, 1861 (*e*), the Court of Admiralty has the same powers over every British ship, as the Court of Chancery has under sects. 62 to 65 of the Merchant Shipping Act, 1854.

Certificates of sale.

Before the Merchant Shipping Act, 1854, difficulties arose when an owner was desirous of selling or mortgaging a ship which was at any place out of the country or possession in which the port of registry was situated. This act, in order to facilitate such sales and mortgages, by enabling the registrars to grant certificates conferring powers of sale or mortgage, contains the following provisions.

By sect. 76, any registered owner who is desirous of disposing by way of sale of a ship in respect of which he is registered at any place out of the country or possession in which the port of registry is situated, may apply to the registrar for a certificate of sale.

By sect. 77, the owner must state to the registrar the following particulars, which are to be entered in the register book:—

- (1.) The names of the persons by whom the power mentioned in the certificate is to be exercised, and the *minimum* price at which the sale is to be made, if it is intended to fix any *minimum*;
- (2.) The specific place or places where the power is to be exercised; and
- (3.) The limit of time within which it is to be exercised. If no place is specified, the power may, subject to some provisions to be presently mentioned, be exercised anywhere.

Sect. 78 provides, that no certificate of sale shall be granted

(*d*) See *Nicholas v. Dracachis*, 1 P. D. 72; *The Horlock*, 2 P. D. 243; *In re The Santon*, 26 Weekly Rep. 810. It has been held by the Scotch Courts that this section only applies to cases where it is desired to prevent a sale by

the Court under sect. 62; *McPhail v. Hamilton*, Seas. Cases, vol. 5 (4th series), 1017.

(*e*) The Admiralty Court Act, 1861, s. 12.

to authorize any sale at a place within the United Kingdom, if the port of registry is situated within it; or at any place within any British possession in which the port of registry is situated. Nor can any certificate be granted to authorize a sale by a person not named in the certificate.

By sect. 79, the certificates must be in the prescribed form (*f*); they must not only mention the particulars required to be entered in the registry book, but must also enumerate any registered mortgages, or certificates of mortgage or sale affecting the ship.

By sect. 81, it is provided, that the following rules shall be observed with respect to certificates of sale :—

- (1.) No such certificate can be granted except for the sale of an entire ship.
- (2.) The power must be exercised in conformity with the directions contained in the certificate.
- (3.) No sale *bond fide* made to a purchaser for valuable consideration can be impeached by reason of the person by whom the power was given dying before the making of the sale.
- (4.) Whenever the certificate contains a specification of the place at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, no sale *bond fide* made to a purchaser for valuable consideration without notice can be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given.
- (5.) Any transfer made to a person qualified to be the owner of British ships must be by bill of sale in the form already mentioned, or as near thereto as circumstances permit.
- (6.) If the ship is sold to a person qualified to hold British ships, she must be registered anew; but notice of all mortgages enumerated on the certificate of sale must be entered in the register book.
- (7.) Previously to such registry, the bill of sale by which the ship is transferred, the certificate of sale, and the certificate of registry, must be produced to the registrar.
- (8.) The registrar must retain the certificates of sale and registry, and after having indorsed on both of them an entry of the fact of a sale having taken place, must for-

(*f*) For the form now in use, see Appendix, "Forms," No. 17.

ward them to the registrar of the port appearing on the certificates to be the former port of registry of the ship, and the last-mentioned registrar must make a memorandum of the sale in his register book, and the registry of the ship in this book is then to be considered as closed, except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered in it.

- (9.) The description of the ship contained in her original certificate of registry may be transferred to the new register book without her being re-surveyed, and the declaration to be made by the purchaser is the same as that which is required from an ordinary transferee (*g*).
- (10.) If the ship is sold to a person not qualified to be the owner of a British ship, the bill of sale by which the ship is transferred, the certificate of sale and the certificate of registry must be produced to some registrar or consular officer, who must retain the certificates, and having indorsed on them the fact of the ship having been so sold, must forward them to the registrar of the port appearing on the certificate of registry to be the port of registry of the ship; and the last-mentioned registrar must make a memorandum of the sale in his register book, and the registry of the ship in this book is then to be considered as closed, except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered in it.
- (11.) If default is made in the production of the certificates mentioned in the last rule, the unqualified purchaser is to be considered by British law as having acquired no title to or interest in the ship; and the person upon whose application such certificate was granted, and the persons exercising the power, are each liable to a penalty not exceeding 100*l*.

Under the same section, and sects. 82 and 83, it is provided that the certificates, if not used, must be given up to be cancelled; the Commissioners of Customs may, in cases in which the certificates are lost or obliterated, direct the issuing of new certificates; and the owners may, in certain cases, by an instrument in a form issued in pursuance of the act (*h*), authorize the registrars to give notice that the certificate is revoked.

(*g*) See Appendix, "Forms," Nos. 2 to 8.

(*h*) See Appendix, "Forms," No. 18.

Sales of vessels are frequently conducted, in the absence of the owner, by brokers (i) or agents. Their authority, even if it is given by a power of attorney, is, according to the ordinary rule, revoked by the death of the owner (j).

In ordinary cases of sale, if the ship is in port, she should, in order to convey an indefeasible title, be actually delivered to the purchaser, since, if she is allowed to remain in the possession of the vendor, she would pass to his assignees, should he become a bankrupt, as being in his order and disposition (k), or should an execution issue upon a judgment against him, the sale might possibly be held void under the 13 Eliz. c. 5 (l). We shall see, however, that mortgages which are duly registered are not affected by the bankruptcy of the mortgagor, although the ship may at the time be in his order and disposition (m).

Bankruptcy of or execution against vendor.

Questions of considerable nicety often arise as to the time when the property in vessels which are building vests in the person for whom they are being built. The determination of this point must depend upon the intention of the parties, as evidenced by the terms of the particular contract under which the vessel is being built. In the ordinary case of a contract to build a ship, the subject-matter of the contract not being in existence, the vendee acquires no property in it until it is finished, and actually or constructively delivered (n). But where, by the terms of the contract, a superintendent is employed by the vendee to overlook the building, and the price is to be paid by instalments, which are regulated by particular stages in the progress of the work, so that the vendee may be said to appropriate

When property passes under contract to build a ship.

(i) Ship brokers are persons employed in the procuring of freight and passengers for ships. With respect to their remuneration, see *Hill v. Kitching*, 3 C. B. 299; *Moss v. Cunliffe*, 2 Sess. Cases (4th series), 657; and *post*, Chap. VI. Part I. By an order of the Commissioners of Customs, their officers are not allowed to act as brokers. A ship broker or agent is not within the acts for the regulation of brokers in the city of London. *Gibbons v. Rule*, 4 Bing. 301. As to the authority of the master to sell, see *post*, Chap. III. (j) *Watson v. King*, 1 Stark. 121; 4 Camp. 272.

(k) *Stephens v. Sole*, cited 1 Ves. sen. 352. See *Swainston v. Clay*, 32 L. J.,

Ch. 503. Where at the time of the sale the ship is at sea, immediate delivery being impossible, it is sufficient if the bill of sale is delivered to the purchaser, provided that he takes possession of the ship upon her arrival in port. *Brown v. Heathcote*, 1 Atk. 160; *Ex parte Matthews*, 2 Ves. sen. 272; *Atkinson v. Maling*, 2 T. R. 462.

(l) Per Abbott, C. J., and Bayley, J., in *Robinson v. M'Donnell*, 2 B. & A. 134.

(m) See the 12 & 13 Vict. c. 106, s. 225; the M. S. Act, 1854, s. 72, and *post*, p. 59.

(n) *Mucklow v. Mangles*, 1 Taunt. 318. See an instance of a constructive delivery, *Carruthers v. Payne*, 5 Bing. 270.

the different portions of the ship as they are from time to time completed, the property in those portions vests in him as soon as each instalment is paid (*o*). The mere fact of the ship being one-third built at the time of the making of the contract has been held not to have this effect (*p*). In all these cases the question is one of fact rather than of law; namely, what was the intention of the parties, as evidenced by their contract and the surrounding circumstances (*q*). In two modern decisions a distinction was drawn, based upon the facts of the cases and nature of the contracts, between the ship herself, and certain materials which, although selected and prepared, had never been actually attached to her; it being held, that the former did and the latter did not vest in the vendee (*r*).

Warranty on
sale

The simple bargain and sale of a ship does not imply any contract that she is seaworthy, or in a serviceable condition. A conveyance of a ship, whilst at sea, was therefore held to be satisfied, although, at the time of the sale, she had been so much injured as to be totally lost within the meaning of a policy of insurance (*s*). Where, however, a person agrees to build or complete a vessel for a purchaser, the vessel must, in order that the contract may be complied with, be reasonably fit for the service for which she was ordered, and for which, in the contemplation of both parties, she was intended (*t*).

(*o*) *Woods v. Russell*, 5 B. & A. 942; *Clarke v. Spence*, 4 A. & E. 448. As to the passing of the property in engines and boilers agreed to be made and fixed on board a ship, see the *Anglo-Egyptian Navigation Company v. Rennie*, L. R., 10 C. P. 271. As to what amounts to an appropriation, see *Goss v. Quinton*, 3 M. & G. 825; *Wilkins v. Bromhead*, 6 M. & G. 963. *Wood v. Bell*, 5 E. & B. 772; *S. C. in error*, 6 E. & B. 355; *Ex parte Lambton*, *In re Lindsay*, L. R., 10 Ch. 405; and the cases cited above.

(*p*) *Laidler v. Burlinson*, 2 M. & W. 602.

(*q*) See *Reid v. Fairbanks*, 13 C. B. 692, and the judgment of the Court in *Wood v. Bell*, 5 E. & B. 772.

(*r*) *Baker v. Gray*, 17 C. B. 462; *Wood v. Bell*, 6 E. & B. 355.

(*s*) *Barr v. Gibson*, 3 M. & W. 390; *Schloss v. Heriot*, 14 C. B., N. S. 59.

(*t*) *Shepherd v. Pybus*, 3 M. & G. 888. These are only instances of the general

rule, that on the sale of an existing chattel of a particular kind, the terms of the contract are satisfied if it is of that kind, since there is, in this case, no implied warranty as to its quality, condition or fitness for any particular purpose. *Parkinson v. Lee*, 2 East, 314; *Budd v. Fairmaner*, 8 Bing. 48; *Chanter v. Hopkins*, 4 M. & W. 399. Where however an article is ordered for a particular purpose, and is made by or under the directions of the vendor, the contract is not complied with unless it will answer such purpose. *Brown v. Edgington*, 2 M. & G. 279. See also *Gray v. Cox*, 4 B. & C. 108; *Ollivant v. Bayley*, 5 Q. B. 288; *Parson v. Sexton*, 4 C. B. 899; *Randall v. Newson*, 2 Q. B. D. 102. There is another class of cases in which the contract is not silent, but the difficulty is to ascertain whether the terms used amount to a warranty, or only to a mere description. See *Budd v. Fairmaner*, *ubi sup.*

Where there are any special terms or warranties in the contract of sale, the rights of the parties must depend upon the circumstances of each particular case (*u*). So on the sale of a ship, what passes to the vendee, in addition to the vessel itself, will depend upon the terms of the particular contract (*x*). In the form of bill of sale now in use under the sanction of the Board of Trade, the words "boats, guns, ammunition, small arms and appurtenances" occur, and this, it is apprehended, is sufficient to pass everything belonging to the ship. It has been held that under an assignment of "all the appendages and appurtenances" of a ship, her chronometer is included (*y*). A

What passes
on sale.

(*u*) Where a ship was sold "with all faults," Lord Kenyon held that the vendor was still bound to disclose latent defects known to him. *Mellish v. Motteux*, 1 Peake, 156. In *Baglehole v. Walters*, 3 Camp. 154, Lord Ellenborough dissented from that decision, holding that in the absence of fraud, the vendor was protected by the stipulation. This case was recognized and acted on in *Pickering v. Dowson*, 4 Taunt. 779. But even these words will not protect a vendor if there is a special description of the vessel in the terms of sale, which would confine their meaning to all faults which a ship answering that description may have. *Shepherd v. Kain*, 5 B. & A. 240. In *Taylor v. Bullen*, 5 Ex. 779, however, a ship having been advertised as A 1, teak-built, was sold by a contract, stating that she was to be bought and sold agreeably to an inventory annexed, which also described her as a teak-built ship, but concluded "the vessel, &c. to be taken with all faults as they now lie, without any allowance for deficiency, &c., or any defect or error whatever." The ship turning out to be neither A 1, nor teak-built, it was held that there was no warranty. The words "with all faults," will not avail to protect the vendor, if means are taken fraudulently to conceal the defects, or a fraudulent description is given at the time of the sale. *Schneider v. Heath*, 3 Camp. 506. Where negotiations occur between parties respecting the sale of a ship, and a written memorandum is drawn up which is intended by the parties to contain the terms finally agreed upon, evidence cannot be received of a representation or warranty not embodied in the memorandum. See per Chambre, J., in *Pickering v. Dowson*, 4 Taunt.

786; *Kain v. Old*, 2 B. & C. 627; *Freeman v. Baker*, 5 B. & Ad. 797. But this rule does not apply in the case of a fraudulent misrepresentation, by which the vendee is induced to enter into the contract. *Wright v. Crookes*, 2 Scott, N. R. 685; *Moens v. Heyworth*, 10 M. & W. 147; *Taylor v. Ashton*, 11 M. & W. 401; *Ormrod v. Huth*, 14 M. & W. 651; *Thom v. Bigland*, 8 Exch. 725. Nor, it is submitted, can it apply to prevent the parties to a contract of sale offering evidence of terms not expressed in the formal bill of sale, which, as we have seen, the law requires to be in a particular form. See *supra*, p. 43, and Appendix, "Forms," No. 10.

(*x*) The decisions as to what is covered by policies of insurance have some bearing on this question; see *post*, Chap. VII. It has been said that by the words "tackle, furniture, apparel, and all other her instruments thereunto belonging," boats are not transferred. *Molloy*, B. 2, c. 1, s. 8. And it has been held that ballast is not part of the furniture of a merchant ship; *Ib.*; *Kynter's Case*, 1 Leon. 46; and that under the words "stores, tackle, apparel, &c.," kintlage does not pass. *Lano v. Noale*, 2 Stark. 105. See also *Langton v. Horton*, 5 Beav. 9, where in a bill of sale the word "appurtenances" was held not to include a cargo of oil which was acquired during the adventure.

(*y*) *Langton v. Horton*, 11 L. J., N. S., Ch. 299; *S. C.*, 1 Hare, 549, where this point is not noticed. See also *Armstrong v. McGregor*, 2 Sessions Cases (4th series), 339; *Richardson v. Clarke*, 15 Maine (American) Rep. 44. The chronometer in use on board a ship often belongs to the master and not to the owners. In *Woods v. Russell*,

transfer of a share of a ship passes the corresponding share in the freight under an existing charter-party, without the mention of the word freight, for the right to freight is incidental to the ownership of the vessel which earns it (z).

MORTGAGE.

We will next consider title by *mortgage*. The Merchant Shipping Acts have, from time to time, made provisions respecting the mortgage of British ships (a).

5 B. & A. 942, a rudder made and cordage bought by a ship-builder, specifically for a ship, were held to pass with the ship to the vendee as against the assignees of the builder who had become bankrupt; see also *Goss v. Quinton*, 3 M. & G. 825; *Wood v. Bell*, 5 E. & B. 772; *The Dundee*, 1 Hagg. 109.

(z) *Lindsay v. Gibbs*, 22 Beav. 522. See as to the liabilities which attach to the vendee, *The Nymph*, Swab. Adm. Rep. 86. As to the effect of imperfect registration on a mortgage, see *Dickinson v. Kitchen*, 8 E. & B. 789; and as to the mortgage of an unfinished ship and its subsequent registration, see *Bell v. Bank of London*, 3 H. & N. 730; see *supra*, p. 19, note (n).

(a) Under Lord Liverpool's Act, 26 Geo. 3, c. 60, it was long a question whether an owner could mortgage a ship, retaining in himself the equity of redemption, or whether a compliance with the forms of that act did not necessarily transfer the whole interest. Since the passing of the later Registry Acts, beginning with 6 Geo. 4, c. 110, the decisions upon this question have become mere matter of history. The following summary of them is given by Mr. Chancellor Kent:—"The language, in many of the cases, as that of Lord Eldon, who scattered *ambiguas voces* to that effect in *Curtis v. Perry*, 6 Vesey, 739; *Campbell v. Stein*, 6 Dow. P. C. 116; *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; *Dixon v. Ewart*, 3 Mer. 333, was in favour of the conclusion that there could be no equitable ownership of a ship, distinct from the legal title, and that upon a transfer under the forms of the Registry Acts, the ship becomes the absolute property of the intended mortgagee, and that the terms and the policy of the Registry Acts were incompatible with the existence of any equity of redemption. But these opinions, or dicta, have been met by a series of adjudications, which

assume the law to be otherwise, and that the Registry Acts related only to transactions between vendor and vendee, and to cases of real ownership; and that an equitable interest in a ship might exist by operation of law, and by the contract of the parties, distinct from the legal estate: and that notwithstanding the positive and absolute terms of the indorsement upon the certificate of register, a mortgage of a ship is good and valid according to the law as it existed before the Registry Acts, provided the requisites of the statutes be complied with. *Mair v. Glennie*, 4 M. & S. 240; *Robinson v. Macdonnell*, 5 Ib. 228; *Hay v. Fairbairn*, 2 B. & A. 193; *Monkhouse v. Hay*, 2 B. & B. 114. The opinion of Sir Thomas Plumer in *Thompson v. Smith*, 1 Madd. Ch. Rep. 395, contained a very clear and masterly vindication of the validity of the mortgage of a ship consistently with the preservation of the forms of the Registry Acts." 3 Kent, Comm. 148 (ed. 1873). Under the M. S. Act, 1854, it is expressly provided, that registered mortgagees are, notwithstanding notice, to rank according to the priority of the registration of their securities. See Sect. 69. The rights arising out of the mortgage of a foreign ship are regulated by those rules by which the mortgage of other personal property is governed, except that a ship, it has been said, does not pass by delivery like an ordinary chattel, and that there is no market overt for ships, and therefore the purchaser of a foreign ship is bound to make enquiries as to the title. If, however, a mortgagee of a foreign ship allows the owner to offer her for sale, suppressing the mortgage, he cannot enforce the mortgage against the purchaser. *Hooper v. Gumm*, L. R., 2 Ch. 282. See also *The Union Bank v. Lenanton*, 3 C. P. D. 243, where it was held that a ship built at a British port, in order to be sold to a foreigner and intended to be delivered

The Registry Act, which was in force at the time of the passing of the Merchant Shipping Act, 1854, namely, the 8 & 9 Vict. c. 89, provided for the transfer by way of mortgage, as well as for the sale of ships (b); and it was held under that act that, unless its provisions in these respects were complied with, there could be no equitable title to a vessel (c).

The Merchant Shipping Act, 1854, introduced different provisions on this head, and for the first time prescribed a form of mortgage, which did not purport actually to transfer the ship. This statute excluded from the register all notice of trusts, express, implied or constructive, and declared that, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner should have power absolutely to dispose of the ship under the provisions of the act (d).

Requirements
of Merchant
Shipping Act
on mortgage.

The effect of this statute was held to be that it was essential that the mortgage of a ship should be accompanied by the formalities mentioned in the act; and that even in a Court of Equity no effect could be given to an unregistered contract to assign a ship as a security for money due (e).

The Merchant Shipping Act, 1862, provides, however, with reference to the Merchant Shipping Act, 1854, that the expression "beneficial interest," whenever used in the second part of that act, shall include interests arising under contract and other equitable interests; and declares that the intention of the act was, that, without prejudice to its provisions for preventing notice of

Protection of
equitable
interests.

to him at a foreign port, was not a British ship; and that an assignment of the ship, which was not in the form of a bill of sale within the Merchant Shipping Acts and was not registered, was a valid assignment.

(b) See the 8 & 9 Vict. c. 89, s. 45. Under that statute, the same form of transfer might be used in the case of a mortgage as in that of a sale, a statement being added to the entry in the book of registry, and also to the indorsement on the certificate of registry, that the transfer was made only by way of mortgage.

(c) See *Davenport v. Whitmore*, 2 Myl. & Cr. 177; *Langton v. Horton*, 5 Beav. 9; *Follett v. Delany*, 2 De G. & S. 235. In *Hughes v. Morris*, 2 De G., M. & G. 349, the Court of Appeal

in Chancery approved of these decisions, and declined to enforce the specific performance of a contract for sale of shares in a ship, although it did not affect to transfer the shares, but was only executory. But see *Armstrong v. Armstrong*, 21 Beav. 71; and see *Duncan v. Tindal*, 13 C. B. 258.

(d) The M. S. Act, 1854, s. 43.

(e) *The Liverpool Borough Bank v. Turner*, 1 J. & H. 159; S. C., on appeal, 30 L. J., Chanc. 379. But see the case of *Lynn v. Chaters*, 2 Keen, 521, decided in 1837 by Lord Langdale on the 3 & 4 Will. 4, c. 55; and see an article entitled "On Equitable Interests in Ships," by Mr. Justice Lindley, in the May number of the Law Magazine for 1862.

trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by it on registered owners and mortgagees, and without prejudice to the provisions contained in it relating to the exclusion of unqualified persons from the ownership of British ships, equities might be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities might be enforced against them in respect of any other personal property (*f*). Since this last-mentioned enactment, any Court before whom the parties interested may come to obtain a decision as to their rights is, as regards the rights of the immediate parties, no longer bound by the registered documents alone, but it may regard the whole circumstances in order to ascertain the real character of the transaction. Thus, in order to give effect to the intention of the parties, the Court may treat as a mortgage that which on the face of it appears to be an absolute transfer (*g*); and it may permit the owner of a ship, who has executed an absolute transfer of his interest in her, to show that the real intention was to give to the transferee only a security by way of mortgage (*h*). In one case the Court refused to assist a mortgagee to enforce the stipulations contained in a registered mortgage, because to do so would be contrary to other agreements made between the parties contemporaneously with and subsequent to the original transaction (*i*).

The following statutory provisions are also in force with respect to mortgages:—

The Merchant Shipping Act, 1854, enacts by sect. 66, that a registered ship or share may be made a security for a loan or other valuable consideration. The instrument creating such security, which is termed in the act “a mortgage,” must be in the prescribed form (*k*), or as near thereto as circumstances

Form of
mortgage.

(*f*) Where a registered mortgagee of a ship deposited with a creditor the instrument of mortgage, and afterwards became bankrupt, it was held that this deposit took the ship out of the order and disposition of the bankrupt and constituted the creditor an equitable mortgagee of the ship. *Lacon v. Liffen*, 32 L. J., Chanc. 25; see also *Stapleton v. Haymen*, 2 H. & C. 918.

(*g*) *The Innisfallen*, L. R., 1 A. & E. 72.

(*h*) *Ward v. Beck*, 13 C. B., N. S. 668.

(*i*) *The Cathcart*, L. R., 1 A. & E. 314.

(*k*) See Appendix, “Forms,” Nos. 11 and 12. If the prescribed form is not adhered to, the registrars are not obliged to record the mortgage without an express order from the Commissioners of Customs. See the M. S. Act, 1855, s. 11, and *ante*, p. 43, n. (*l*).

permit; and on its production the registrar of the port at which the ship is registered must record it in the register book (*l*).

By sect. 67, every mortgage must be recorded by the registrar in the order of time in which it is produced to him for that purpose; and he must, by memorandum under his hand, notify on the instrument of mortgage that it has been recorded by him, stating the date and hour of such record.

By sect. 68, whenever any registered mortgage has been discharged, the registrar must, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon, duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged. Upon this entry being made, the estate, if any, which passed to the mortgagee vests in the same person or persons in whom the same would, having regard to intervening acts and circumstances, have vested if no such mortgage had ever been made (*m*).

By sect. 69, if there is more than one mortgage registered of the same ship or share, the mortgagees, notwithstanding any express, implied or constructive notice, are entitled to priority one over the other according to the date at which each instrument is recorded in the register books, and not according to the date of the instrument itself (*n*). Priority of mortgagees.

Sect. 70 provides, that a mortgagee shall not by reason of

(*l*) An unregistered mortgage is not void, and the only consequence of not registering a mortgage is to postpone it to a subsequent mortgage, or a transfer, which is registered before it. And it seems that the omission of the mortgagee of a ship to register his mortgage, until after an equitable assignment of freight has been made by the owner to a third person who has advanced money on the freight, in ignorance of the mortgage, even though such third person may have been misled by the circumstance that no mortgage appeared on the register at the time he advanced the money, will not, in the absence of fraud on the part of the mortgagee, prevent the mortgagee, if he afterwards registers his mortgage and takes possession of the ship, asserting his right to the accruing freight as against such third person. *Keith v. Burrows*, 1 C. P. D. 722. The decision in this case was reversed on appeal (2 C. P. D. 163;

2 App. Ca. 636), but on grounds which do not affect the reasoning of the Court below so far as it relates to the points above mentioned. The Court will not give effect to an unregistered mortgage so as to prejudice the interest of a duly registered mortgagee. *Bell v. Blyth*, L. R., 6 Eq. 201; 4 Ch. 136.

(*m*) Where the entry of discharge has been duly made the registrar has no power to revive the mortgage by making a memorandum on the register that the entry of discharge was made by mistake. *Bell v. Blyth*, L. R., 6 Eq. 201; 4 Ch. 136. Where an entry on the register has been made by mistake, the proper course is to apply to the Admiralty Division of the High Court for an order to rectify the mistake. *The Rose*, L. R., 4 A. & E. 6.

(*n*) As to the priority of mortgagees under the system of registry adopted before the present act, see *Ex parte Jones*, 2 Tyr. 671; *S. C.*, 2 C. & J. 513.

his mortgage be deemed to be the owner of a ship or share, nor shall the mortgagor be deemed to have ceased to be such owner, except in so far as may be necessary for making the ship or share available as a security for the mortgage debt (*o*). In construing this section, it has been held that a mortgagor who remains in the ostensible ownership of the ship may confer a right of lien against her for necessary repairs (*p*).

Power of sale. By sect. 71, every registered mortgagee has power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money. If, however, there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee may, except under the order of some Court capable of taking cognizance of such matters, sell it without the concurrence of every prior mortgagee (*q*).

There is nothing in the section to qualify the exercise of this power. In one of the forms of mortgage, printed in the Appendix (*r*), there is a condition that the power of sale shall not be exercised until after the day on which the mortgage money is covenanted to be paid. Unless, however, a special provision is inserted in the mortgage requiring some specified notice for repayment of the mortgage money to be given before the power of sale is exercised, there seems nothing to prevent the mortgagee making immediate demand for the repayment of the mortgage money at any time after the day on which the money is covenanted to be paid, and in case of non-payment proceeding forthwith to sell the ship.

(*o*) The effect of this section is, not to limit the common law rights of a mortgagee, but to protect him against claims for which he might otherwise be liable as owner in possession. *Dickinson v. Kitchen*, 8 E. & B. 789.

(*p*) *Williams v. Allsup*, 10 C. B., N. S. 417. But the shipwright, of course, only retains his lien so long as he retains possession. *The Scio*, L. R., 1 A. & E. 353.

(*q*) Although the second mortgagee of a ship cannot take possession as against a first mortgagee, yet as against all other persons he has a right to take possession, and can enforce such right

if necessary by obtaining the appointment of a receiver. See the judgment of Lindley, J., in *Keith v. Burrows*, 1 C. P. D. 722. This dictum does not seem to be affected by the judgments afterwards delivered in the same case by the Court of Appeal and the House of Lords; 2 C. P. D. 163; 2 App. Ca. 636; see also *Liverpool Marine, &c. v. Wilson*, L. R., 7 Ch. 507. As to the right of a second mortgagee of shares in a ship to arrest the ship by Admiralty process, see *The Volant*, Br. & L. 323.

(*r*) See Appendix, "Forms," No. 11.

By sect. 72 of the Merchant Shipping Act, 1854, a registered mortgage of any ship or share is not affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding the mortgagor at the time of his becoming bankrupt may have in his possession and disposition and be reputed owner of the ship or share thereof. The mortgage is also to be preferred to any right, claim or interest in the ship or any share thereof which may belong to the assignees of the bankrupt. Bankruptcy of mortgagor.

Mortgages, when duly registered, were expressly excepted from the effect of the reputed ownership clauses contained in the Bankrupt Act, 6 Geo. 4, c. 16, s. 72; and the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 125, continued the exception. But the present Bankruptcy Act, 32 & 33 Vict. c. 71, contains no express provisions on the subject, probably because the 72nd section of the Merchant Shipping Act, 1854, was considered to render any such provision unnecessary (s).

By sect. 73 of the Merchant Shipping Act, 1854, a registered mortgage of a ship or share may be transferred to any person. The transfer may be by an indorsement on the mortgage (t), and on its production the registrar must enter in the register book the name of the transferee as mortgagee of the ship or shares therein mentioned, and by memorandum under his hand, record on the instrument of transfer that the same has been recorded by him, stating the date and hour of such record. Transfer of mortgages.

By sect. 74, if the interest of any mortgagee in a ship or share becomes transmitted in consequence of death, bankruptcy or insolvency, or in consequence of the marriage of a female mortgagee, or by any lawful means other than by a transfer

(s) See *Robinson v. McDonnell*, 5 M. & S. 228; *Hay v. Fairbairn*, 2 B. & A. 193; *S. C.* in error, 2 B. & B. 114; *Ex parte Burns*, 1 Jac. & W. 378; *Kirkley v. Hodgson*, 1 B. & C. 588, which were decided upon the repealed Bankrupt Act. In *Campbell v. Thomson*, 2 Hare, 140, where a mortgagee had omitted to procure an indorsement within thirty days after the return of the vessel, and the owner had subsequently become bankrupt, it was decided that the former had no equity distinct from his

legal rights to restrain the sale of the ship by the assignee. But see the M. S. Act, 1862, s. 3, ante, p. 55. See also *Douglas v. Russell*, 4 Sim. 524; *Lacon v. Liffen*, 32 L. J., Ch. 25, and *Liverpool Borough Bank v. Turner, J. & H.* 170; *Stearns v. Clay*, 32 L. J., Ch. 503; 4 Giff. 187; see also the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

(t) See Appendix, "Forms," Nos. 11 & 12.

according to the provisions of the act, the transmission must be authenticated by a declaration of the person to whom such interest has been transmitted, made in the specified form (o), and containing a statement describing the manner in which, and the party to whom, such property has been transmitted. This declaration must be made and subscribed, if the declarant resides at or within five miles of the custom house of the port of registry, in the presence of the registrar, but if beyond that distance in the presence of any registrar or of any justice of the peace, and must be accompanied by the same evidence as is required to authenticate a corresponding transmission of property from one registered owner to another (p).

By sect. 75, the registrar, upon the receipt of this declaration and the production of the evidence, must enter the name of the person or persons entitled under such transmission in the register book as mortgagee or mortgagees of the ship or share in respect of which such transmission has taken place.

Admiralty jurisdiction in respect of mortgages.

By the 3 & 4 Vict. c. 65, s. 3, the Admiralty Division of the High Court has jurisdiction over all causes of action in respect of any mortgage when the ship is under arrest by process of the Court; and by the Admiralty Court Act, 1861 (q), sect. 11, jurisdiction is conferred upon the Admiralty Division over any claim in respect of any mortgage duly registered under the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the Court or not.

Rights of mortgagor and mortgagee as to ship.

The mortgagor, so long as he is in possession, is absolute owner, except in so far as is necessary for making the ship available as a security for the mortgage debt. He can, therefore, bind the mortgagee by a charter party (r); but he cannot assign the freight to a third person before it becomes due, so as to prevent the mortgagee of the ship, on taking possession

(o) See Appendix "Forms," Nos. 13, 14, 15.

(p) See *ante*, p. 46.

(q) The 24 Vict. c. 10; *The Fortitude*, 2 W. Rob. 217.

(r) *Collins v. Lamport*, 34 L. J., Ch. 196; 13 W. R. 283; 11 Jur., N. S. 1.; *Johnson v. The Royal Mail Steam Packet Company*, L. R., 3 C. P. 38. But in a case where a mortgagee

took with notice of a charter party entered into by the mortgagor, the Lords Justices granted an interlocutory injunction restraining the mortgagee from exercising his power of sale in such a manner as to interfere with the rights of the charterer. The injunction was dissolved at the hearing. *De Mattos v. Gibson*, 4 De G. & J. 276.

before the freight is due, from receiving it (s). The judgment creditor of a mortgagor, who is the registered owner of a ship, cannot take her in execution as against the mortgagee, for this would defeat the right of the mortgagee to make the ship available as a security for his debt (t). On default in payment of the mortgage money or interest, the mortgagee is entitled to take possession of the ship, and, if he is in possession, he is entitled to use the ship (u). When a mortgagee in order to obtain possession of the ship is compelled to pay money to satisfy a maritime lien on the ship for wages he is entitled to recover the sum so paid from the person from whom the wages were owing (v).

But although an absolute assignment of a ship, as we have seen, passes to the transferee the accruing freight (w), yet it is well established that a mortgagee obtains at the time of the mortgage no absolute right to the accruing freight as an incident of his mortgage; but if he takes possession of the ship before the freight is actually earned, he then becomes entitled to the accruing freight as an incident of his possession (x); and if he finds any cargo on board in respect of which the mortgagor has a lien, the mortgagee succeeds to that lien, and can enforce it in a court of law (y). It will generally suffice if he takes possession after the ship has arrived in dock but before the cargo is delivered, as until then the right to freight does not in

—as to
freight.

(s) *Brown v. Tanner*, L. R., 3 Ch. 597; *Wilson v. Wilson*, L. R., 14 Eq. 32.

(t) *Dickinson v. Kitchen*, 8 E. & B. 789.

(u) *De Mattos v. Gibson*, 30 L. J., Ch. 145. As to the right of a mortgagee to use the ship, see *The European and Australian Royal Mail Packet Company v. The Royal Mail Steam Packet Company*, 4 K. & J. 676; *Williams v. Allsup*, 10 C. B., N. S. 417.

(v) *Johnson v. The Royal Mail Steam Packet Company*, L. R., 3 C. P. 38.

(w) See *ante*, p. 54.

(x) *Dean v. McGhie*, 4 Bing. 45; *Kerwill v. Bishop*, 2 Tyr. 602; *S. C.*, 2 C. & J. 529. See also *Brown v. North*, 8 Exch. 1, where the ship, with all her freight and earnings, was mortgaged, *Alexander v. Simms*, 5 De G., M. & G. 57; *Gardner v. Cazenove*, 1 H. & N. 423; *Langton v. Horton*, 5 Beav. 22; *Willis v. Palmer*, 7 C. B., N. S. 340; *Keith v. Burrows*, 2 App. Ca. 636.

The first registered mortgagee of a ship by taking possession of her before the freight is completely earned acquires a right, as against other persons having equitable charges on the freight of which he had no notice, to retain out of the freight not only the sum due in respect of his mortgage, but also any other sum due to him in respect of which he had subsequently acquired a charge on the freight, and this notwithstanding that the other persons having equitable charges on the freight gave notice of their charges to the charterer by whom the freight was payable before the mortgagee gave notice to the charterer of his charge. *The Liverpool Marine Credit Co. v. Wilson*, L. R., 7 Ch. 507.

(y) It seems to make no difference whether the mortgage is made prior to the commencement of the voyage or the very day before possession is taken. See per Mellish, L. J., *Keith v. Burrows*, 2 C. P. D. at page 165.

ordinary cases accrue (z). But where the mortgage relates to a portion of the ship only, and so the mortgagee is not entitled to take possession of the ship and to demand the entire freight, he may effectually assert his claim to his share of the freight by such intervention as is possible under the circumstances (a).

It is important to distinguish between freight in the proper sense of the word and sums of money, which, although they may represent increased value received by the owner of the ship, and may be described in mercantile contracts as representing freight, yet do not constitute freight in the proper sense of the word. "Nothing is freight unless there is involved in it a contract to carry; . . . if there is no contract to carry, then, although the sum to be paid may be called freight, it is not in point of law freight within the rule that the mortgagee is entitled to the accruing freight" (b).

Certificates of mortgage.

We have already mentioned the powers conferred by the

(z) *Cato v. Irving*, 5 De G. & S. 210; but see *Rusden v. Pope*, L. R., 3 Ex. 269.

(a) *Benyon v. Godden*, 3 Ex. D. 263.

(b) Per Mellish, L. J., *Keith v. Burrows*, 2 C. P. D. at page 167. In the case of *Keith v. Burrows*, 1 C. P. D. 722; 2 C. P. D. 163; 2 Appeal Cases, 636, the facts were these. Cargo was shipped on account of ship under bills of lading, which stated the freight to be 1s. per ton. The ordinary rate of freight at the time was 55s. The bills of lading were made out to the order of the shippers, who drew bills on the shipowner for the price of the cargo. The shipowner, in order to meet the bills, procured advances from the defendants on the terms that the cargo should be sold afloat, and that the defendants should receive the proceeds on account of the shipowner. The cargo was sold accordingly by the shipowner and the defendants to J. & Co., and one of the terms of the contract of sale was expressed to be "as cargo is coming on ship's account freight is to be computed at 55s. per ton." The bills of exchange were met by the shipowner with the money advanced by the defendants; and the shipowner, having obtained the bills of lading indorsed by the shippers, handed them to the defendants. The

shipowner indorsed on the bills of lading a memorandum to the following effect:—We assign our interest in the within freight to B. and P. (the defendants). The freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton. When the ship arrived, the plaintiffs, who were registered mortgagees, took possession of her and claimed payment of freight at the higher rate of 55s. The Common Pleas Division held that the plaintiffs were entitled to freight at the higher rate; but this decision was reversed by the Court of Appeal. The Court of Appeal held that the real freight was the sum named in the bills of lading; the bills of lading, as appeared by the surrounding circumstances, were a valid contract and not a mere sham, for it was never intended that the shipowner should have the goods until he met the bills, and therefore the goods could not be treated as if they were the shipowner's own goods at the time they were shipped. The Court of Appeal further held that the contract of sale to J. & Co. was in no sense a contract of carriage, and the 55s. mentioned in that contract was not freight, but purchase money only. The decision of the Court of Appeal was affirmed by the House of Lords.

Merchant Shipping Act, 1854, with reference to certificates of sale (c). Powers in many respects similar, but which may be exercised not only with respect to the whole ship, but also with respect to any share, are also given by the statute in cases of mortgage. But in cases of mortgage the powers are rarely exercised.

Sect. 76 provides for the granting by the registrars of certificates of mortgage to any registered owner desirous of disposing of his interest at any place out of the country or possession where the ship is registered, in the same way and upon the same particulars being furnished as in cases of intended sale (d). In cases of mortgage, however, the maximum amount of the charge to be created must, if fixed, be stated.

By sect. 79, the certificates of mortgage must be in a form given by the statute (e); and by sect. 80, the following rules are laid down with respect to them by the statute:—

- (1.) The power must be exercised in conformity with the directions contained in the certificate.
- (2.) A record of every mortgage made under it must be indorsed on it by a registrar or British consular officer (f).
- (3.) No mortgage *bonâ fide* made under it can be impeached by reason of the person by whom the power was given dying before the making of the mortgage.
- (4.) Whenever the certificate contains a specification of the place at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, no mortgage *bonâ fide* made to a mortgagee without notice can be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given.
- (5.) Every mortgage registered on the certificate in the manner required by the act has priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book; and if there be more mortgages than one so indorsed, the mortgagees claiming under them are entitled to priority according to the date at which a record of each instrument is indorsed on the certificate, and not according to the date of the instrument creating the

(c) *Ante*, p. 48.

(d) *Ante*, p. 49.

(e) See Appendix "Forms," No. 16.

(f) As to consular fees, see Appendix "Orders in Council."

mortgage, notwithstanding any express, implied or constructive notice.

- (6.) Subject to these rules, every mortgagee whose mortgage is registered on the certificate has the same rights and powers, and is subject to the same liabilities, as if his mortgage had been registered in the register book instead of on the certificate.
- (7.) The discharge of any mortgage registered on the certificate may be indorsed on it by any registrar or British consular officer, upon the production of such evidence as is required by the act to be produced to the registrar on the entry of the discharge of a mortgage in the register book; and when this is done, the estate which passed to the mortgagee vests in the same person in whom it would have vested if no mortgage had been made.
- (8.) Upon the delivery of any certificate of mortgage to the registrar by whom it was granted, he must, after recording in the register book, in such manner as to preserve its priority, any unsatisfied mortgage registered on it, cancel it, and enter the fact of the cancellation in the register book; and every certificate so cancelled is void (g).

CAPTURE.

Title by capture occurs when the vessel of an enemy is taken in time of war, by a ship belonging to a hostile country (h), and is condemned by a competent court (i).

By pirates.

Pirates, who have been styled *hostes humani generis*, are not recognized by the law of nations as enemies, so as to entitle them to the right of capture (j); and if ships or goods taken by them be brought into a port of this country, they ought to be returned to the owner, because goods piratically taken cannot

(g) It is important to bear in mind, that, by sect. 100 of the M. S. Act, 1854, all persons beneficially interested (otherwise than by way of mortgage) in any ship or share which is registered in the name of another person, are made liable to the pecuniary penalties imposed by the statute or any other statute, on owners of ships and shares.

(h) *Wilson v. Forster*, 6 Taunt. 25. See *The Ionian Ships*, 2 Spinks, 212.

(i) Molloy, B. 1, c. 2 and 3; *Assievedo v. Cambridge*, 10 Mod. 77; Bynkershoek *Quest. Publ. Juris*, L. 1, c. 4, Lyons edit. 1767; see also per Lord Mansfield in *Goss v. Withers*, 2 Burr. 690.

(j) Grotius *de Jure Belli ac Pacis*, ib. 3, c. 9, s. 16; Molloy, B. 1, c. 4; and *In re Ternan or Tienan*, 5 B. & S. 645; 33 L. J., M. C. 201; and *Attorney-General for Colony of Hong Kong v. Kwok-a-Sing*, L.R., 5 P. C. 179.

be transferred to a third person as against their legitimate owner (*k*).

A person who in good faith and innocently purchases a vessel formerly employed as a pirate, before proceedings have been instituted for her condemnation, may acquire a good title to her as against the Crown (*l*). The vessels of any established government cannot be treated as pirates (*m*).

Capture is usually made by a Queen's ship, or by a merchant vessel fighting in self-defence. In former times capture was frequently made by a merchant vessel having letters of marque (*n*) from the sovereign. It has been doubted whether a private vessel uncommissioned may capture the ships of an enemy (*o*); the better opinion seems to be, that uncommissioned vessels of a belligerent state, although they can acquire no private property in hostile ships, may at all times capture them, without being deemed by the law of nations to be pirates (*p*).

By a Queen's ship or merchant vessel.

The property in vessels or cargoes taken as and duly adjudicated to be prize belongs to the state, and no subject can have any interest in them, except by statute, or under a grant from the Crown (*q*). The distribution of the property in captured

To whom property in prize belongs.

(*k*) The 27 Edw. 3, stat. 2, c. 13; Jenk. Cent. 165; Molloy, B. 1, c. 4, s. 22; *The Hercules*, 2 Dodson, 372.

(*l*) *The Telgrafo*, L. R., 3 P. C. 673. See also the 13 & 14 Vict. c. 26, by which jurisdiction is given to the Court of Admiralty to adjudicate on questions arising from engagements with pirates by Queen's ships, or ships of war belonging to the East India Company, and to restore to the owners, on payment of salvage, property re-taken from pirates. See also a Report of the Statute Law Commission relating to piracy, session 1878.

(*m*) Molloy, B. 1, c. 4, s. 4; *The Helena*, 4 Rob. 3; Phillimore's Int. Law, vol. 1, p. 425.

(*n*) These are extraordinary commissions issued, either in time of open war, or in time of peace after all attempts to procure legal redress have failed, by the Lords of the Admiralty, or the vice-admirals of a distant province, to the commanders of merchant ships authorizing reprisals, for reparation of the damages sustained by them through enemies at sea; they are either *special*, to make reparation to individuals, or *general*, when issued by the govern-

ment of one state against all the subjects of another. See 1 Beawes, 311; 1 Black. Com. 258. An interesting account of the extent to which this practice was formerly carried will be found in Hallam's Middle Ages, vol. 2, pp. 396-7.

(*o*) 1 Kent, Com. 96; Lord Hale's Treatise concerning the Customs; Harg. Law Tracts, 245.

(*p*) 1 Kent, Com. 96; Kent's International Law, by Abdy, 247. *The Johanna Emilia*, 1 Spk. 319; *The Rebeckah*, 1 Rob. 227, 231, n.; *The Haase*, 1 Rob. 286; *The Amor Parentium*, ib. 303; Phillimore's Int. Law, vol. 3, pp. 151, 152, ed. 1873; and *Brown v. The United States*, 8 Cranch, 132. The principal European Powers, by the Declaration of Paris (16 April, 1856), declared that "Privateering is and remains abolished." Hertlet's Treaties, vol. x. p. 547.

(*q*) See Vattel's Law of Nations, bk. 3, c. 15, s. 229; 1 Black. Com. by Christian, 259, note: the judgment of Lord Stowell in *The Elisee*, 5 Rob. 182, the judgment of Sir John Nicholl in *The Thetis*, 3 Hagg. 231, and the judgment of Sir Robert Phillimore in

vessels taken, either by a Queen's ship or by a private vessel of this country acting under letters of marque, became during the French war the subject of legislative enactments (r). During the Crimean war, "The Prize Act, Russia, 1854" (17 Vict. c. 18), was passed for the regulation of rights of prize and capture. This act expired with that war. The act by which naval prizes are now regulated is "The Naval Prize Act, 1864" (27 & 28 Vict. c. 25). This is a permanent statute, and deals with the whole question of prize courts, procedure, special cases of capture, prize salvage, and bounty. By the 27 & 28 Vict. c. 23, all the earlier naval prize acts are repealed, and by the 27 & 28 Vict. c. 24, regulations are made in respect of navy prize agents.

Condemnation.

An important branch of this subject is the law and practice of condemnation, inasmuch as in time of peace, a title to vessels may be acquired by purchase in the ordinary course of business, the validity of which may depend upon a previous legal condemnation in time of war, an official copy of which condemnation is required for the purpose of registering as a British ship (s). It has been said, however, that no title to a captured British ship can be acquired by a subject of this country, although the sale to him is subsequent to a legal condemnation by a foreign Court (t).

By what court.

The proceedings in cases of prize being *in rem*, the proper tribunal to condemn a captured vessel is the Admiralty Court

The Banda and Kirwee Booty, L. R., 1 A. & E. at p. 134. It would seem that by the common law goods taken from an enemy belonged to the captor. *Finch's Law*, 28, 178; *R. v. Broom*, 12 Mod. 135; *Murrough v. Comyns*, 1 Wils. 213.

(r) The statutes relating to prizes and prize agents will be found collected in Pritchard's Admiralty Digest, ed. 1847, tit. "Prize," up to the date of that work. See also Phillimore, International Law, vol. 3; Lushington, Prize Law; and Pistoye and Du Verdy, Traité des Prises Maritimes. The instructions as to the disposal of captured vessels, the standing interrogatories to be administered in prize cases, and the principal Orders in Council issued during the Russian war with regard to belligerent rights, are set out in the appendix to the first volume of Spink's Reports. The Prize Jurisdiction of the High Court of Admiralty

of Scotland was, by the 6 Geo. 4, c. 120, vested in the High Court of Admiralty of England. Since the Act of Union, the Court of Admiralty in Ireland has not taken cognizance of prize questions. See Parliamentary Report, Admiralty Court in Ireland, session 1864, Appendix A.

(s) *Thermolin v. Sands*, Carth. 423; per Lord Mansfield, *Goss v. Withers*, 2 Burr. 694; *Nostra Signora de los Angeles*, 3 Rob. 287; The M. S. Act, 1854, s. 40.

(t) Per Lord Eldon in *Woodward v. Larkin*, 3 Esp. 288. The 45th section of the 27 & 28 Vict. c. 25, gives power to her Majesty in Council to make such orders as may seem expedient for prohibiting or allowing the ransoming or entering into any contract or agreement for the ransoming of any ship or vessel belonging to her Majesty's subjects, and taken as prize by any of her Majesty's enemies.

of the country of the captor, acting in that country (*u*). And by the law of nations a prize cannot be legally condemned by a consul, or other minister of the captor's country in the port of a neutral state to which she has been taken (*x*).

A further consequence of these proceedings being *in rem* which is stated by the writers on civil law, and admitted by most of the Admiralty Courts in Europe, is, that at the time of the condemnation the prize must be *infra præsidia*, that is, within the dominion of the captor's country. The English Court of Admiralty, however, whilst recognizing this principle in theory, has, by its practice, adopted a different rule, holding that a prize taken by a British subject may be condemned by the Court of Admiralty in this country, although she is in a neutral port at the time of the sentence; and in accordance with the rule, that in the conduct of war that must be held to be lawful in your enemy which is practised by yourself, similar condemnations by foreign Courts of Admiralty have been upheld here (*y*). In what place.

For purposes of condemnation ports belonging to allies are considered as ports belonging to the belligerent country to which they are allied, so that a sentence by a consul of the captor's country given in the country of an ally, to a port of which the vessel has been taken, is valid (*z*).

The Admiralty Court of Prizes alone has jurisdiction, not only over the question of prize, but also over all its consequences with respect to freight, cargo, and the like; and wherever such questions arise, the Courts of Common Law are guided by its decisions (*a*).

(*u*) Molloy, B. 1, c. 2, s. 21; per Lord Stowell, *The Flad Oyen*, 1 Rob. 139.

(*x*) *The Flad Oyen*, *ubi sup.*; *The Kierlighett*, 3 Rob. 96; *Havelock v. Bockwood*, 8 T. R. 268.

(*y*) *The Heinrich and Maria*, 4 Rob. 43; *S. C.* affirmed in Court of Appeal, 6 Rob. 138, note (*a*); *The Comet*, 5 Rob. 285; *The Victoria*, Edw. 97; *The Polka*, 1 Spinks, 447. See also the judgment of Sir Robert Phillimore in *The Gauntlet*, L. R., 3 A. & E. 381, at p. 389. In America this question has been argued on principle, and the Supreme Court of the United States has held that a condemnation of prize property whilst lying in a neutral

port, or in the port of an ally, is valid, and may be rightfully proceeded with in the Courts of the captors. See a note by Mr. Justice Story to the American edition of Abbott on Shipping, p. 16.

(*z*) *Oddy v. Bovill*, 2 East, 473; *The Christopher*, 2 Rob. 209.

(*a*) *Hughes v. Cornelius*, 2 Show. 232, "for otherwise," as is quaintly said in that case, "the merchants would be in pleasant condition;" *Tompson v. Smith*, Sid. 320; *Le Caux v. Eden*, 2 Doug. 594; *Mitchell v. Rodney*, 2 Br. P. C. 423 (1783); *Smart v. Wolff*, 3 T. R. 323; *Oddy v. Bovill*, *ubi sup.* See also *Faith v. Pearson*, Holt, N. P. C. 113; 6 Taunt. 439, where a ship was seized

When, by condemnation, a complete title has vested in the captor, the property in the prize relates back to the time of the capture (*b*), and, consequently, an assignment by the captor in the meantime is valid (*c*).

Registry after
condemna-
tion.

In order to entitle a captured vessel to the privileges of a British ship she must be registered, and, as in this case, no builder's certificate can be obtained, the owner must produce an official copy of the condemnation of the ship, and must state in the declaration of ownership the time, place and Court at and by which she was condemned (*d*).

FOREIGN
ENLISTMENT
ACT.

Provisions have been made from time to time, regulating the conduct of British subjects during the existence of hostilities between foreign states with which this country is at peace (*e*). The statute at present in force is "The Foreign Enlistment Act, 1870" (33 & 34 Vict. c. 90), in which are several provisions having a material bearing upon the building, equipment and employment of ships. This act contains most stringent provisions against building or agreeing to build, or causing to be

as prize by a commander of a king's ship, and afterwards released, and it was held that no action at law could be maintained. An elaborate account, by Lord Mansfield, of the origin, history and practice of the Admiralty Prize Court will be found in *Lindo v. Rodney*, 2 Doug. 613, note. See also *Campden (Lord) v. Home*, 2 H. Bl. 583. The sentence of a foreign Court of Prize of competent jurisdiction is binding in this country, and, being a decision as to the status of property, binds not only the parties, but is conclusive against all the world, as to the existence of the grounds on which it professes to decide; and if the sentence is general it is final as to the point decided; but if the sentence itself professes to be made on particular grounds which are set forth, and which do not appear to warrant the condemnation, or if the judgment appears on the face of it to be contrary to natural justice, or to the law of nations, the Courts of this country will not hold themselves bound by it; *Bernardi v. Motteux*, 2 Doug. 575; *Baring v. Claggett*, 3 B. & P. 201; *Pollard v. Bell*, 8 T. R. 434; *Bolton v. Gladstone*, 5 East, 155; *S. C.* affirmed in error, 2 Taunt. 85; *Hobbs v. Hemming*, 17 C. B., N. S. 791. In

this case it was held that the finding of a matter-of-fact by a Prize Court cannot be pleaded as an estoppel in the cases where if adduced in evidence the judgment would be received as conclusive proof of the fact so found. See also *Don v. Lippmann*, 5 Cl. & Fin. 1; *Henderson v. Henderson*, 6 Q. B. 288; *Williams v. Armroyd*, 7 Cranch (Amer.), 423, and the notes to the *Duchess of Kingston's Case*, 2 Smith's L. C. 777 (7th ed.), also Story's Conflict of Laws, c. 15. As to the effect of condemnation by foreign Admiralty Courts upon a warranty of neutrality, see *post*, Chap. VII., INSURANCE.

(*b*) *Stevens v. Bagwell*, 15 Ves. 139. As to the consequences of restitution when a vessel has been wrongfully captured, see *The Ostsee*, 9 Moore, P. C. C. 150; 2 Spinks, 170.

(*c*) *Morrough v. Comyns*, 1 Wils. 211; *Alexander v. Duke of Wellington*, 2 Russ. & M. 35.

(*d*) The M. S. Act, 1854, sects. 38 and 40, and *ante*, p. 18.

(*e*) See the 59 Geo. 3, c. 69, repealed by the Foreign Enlistment Act, 1870; also *Burton v. Pinkerton*, L. R., 2 Ex. 340; *Att.-Gen. v. Sillem, The Alexandra*, 2 H. & C. 431; *The Salvador*, L. R., 3 P. C. 218, decisions upon this act.

built, any ship, or issuing or delivering any commission for any ship, or equipping, despatching, or causing or allowing to be despatched, any ship with intent or knowledge, or having reasonable cause to believe, that it shall or will be employed in the military or naval service (*f*) of any foreign state at war with any friendly state. The breach of any of these provisions renders the offender liable to fine and imprisonment, and the ship and her equipment to forfeiture (*g*).

If, however, a person building or equipping a ship in any of the above cases, in pursuance of a contract made before the commencement of war, forthwith upon a proclamation of neutrality gives notice to the Secretary of State, and furnishes such particulars of the contract, and matters relating to or done under it, as may be required, and also gives such security, and takes and permits to be taken such other measures, if any, that the Secretary of State may prescribe for ensuring that the ship shall not be despatched, delivered or removed without license from the Queen until the termination of the war, he will not be liable to the penalties imposed (*h*).

Penalties are also created against aiding in the equipment for war of any ship within the Queen's dominions, in the military or naval service of any foreign state at war with a friendly state (*i*); also against the preparing or fitting out any naval or military expedition to proceed against the dominions of any friendly state (*k*).

If, during the continuance of a war in which the Queen is

(*f*) The act is printed in the Supplementary Appendix, p. 152. A ship employed to lay a telegraphic cable merely intended to assist military operations, is within this provision. *The International, L. R.*, 3 A. & E. 321.

(*g*) The Foreign Enlistment Act, 1870, s. 8. For what amounts to a breach of this section by sending a tug to tow a prize, see *The Gauntlet, L. R.*, 3 A. & E. 381; 4 P. C. 184. As to jurisdiction and legal procedure under this act, see sects. 16 to 20 and 27; as to the authority of the officers of customs and of Queen's ships to seize offending ships, and of the secretary of state and others to detain offending ships, and to grant search warrants, see sects. 21 to 26; see also the interpretation clause, sect. 30.

(*h*) *Ib.* s. 8. Sect. 9 provides that where any ship is built by order of or

on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

(*i*) *Ib.* s. 10.

(*k*) *Ib.* s. 11. Ships and their equipments, and arms and munitions of war used in or forming part of such expeditions, are forfeited.

neutral, any ship, goods or merchandise captured as prize within the territorial jurisdiction of the Queen, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned or despatched, or the force of which may have been augmented contrary to the provisions of the act, are brought within the Queen's dominions by the captor or his agent, or by any person having come into possession thereof with knowledge that the same was prize of war so captured, the original owner or his agent, or any person authorised by the government of the foreign state to which the owner belongs, may apply to the Court of Admiralty for seizure and detention of such prize, and the Court, on due proof of the facts, must order it to be restored (*l*).

The act provides also for the punishment by fine and imprisonment of the master or owner, and for the detention of their ship, if they take or engage to take or have on board within the Queen's dominions any British subject who, within or without the Queen's dominions, has without her licence accepted or agreed to accept any commission or engagement, or who is about to quit the Queen's dominions with intent to accept a commission or engagement, in the military or naval service of any foreign state at war with a friendly state (*m*).

Forfeiture
under
Customs and
Slave Trade
Acts.

Ships infringing the Customs Acts (*n*) and the Slave Trade Acts (*o*) are liable to forfeiture.

(*l*) *Ib.* s. 14. An order made under this section is subject to appeal, and until a final order is made the Court may make provisional orders as to the custody or sale of the ship and cargo as in other cases. The Court may release the ship on bail. *The Gauntlet*, L. R., 3 A. & E. 319.

(*m*) Sect. 7.

(*n*) The Customs Laws Consolidation Act, 1876, 39 & 40 Vict. c. 36, ss. 172—206. See *Lockyer v. Offley*, 1 T. R. 252.

(*o*) The 36 & 37 Vict. c. 88. *The Laura*, 2 Moo. P. C. C., N. S. 181; *The Newport*, Swa. 317. Where a vessel has been seized as a slaver without cause, damages may be recovered against the captor; *The Levin Lank*, Swa. 45; *The Ricardo Schmidt*, L. R., 1 P. C. 268. As to the forfeiture of ships unlawfully carrying natives of the Pacific Islands, see the 35 & 36 Vict. c. 19, and the 38 & 39 Vict. c. 51.

CHAPTER II.

THE OWNER.

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HAVING described the various modes of acquiring and perfecting a title to ships, we will now consider the evidence of ownership, and the duties and liabilities of owners, as between themselves and as regards others.

Possession is, as we have seen, *prima facie* evidence of ownership (a). Under the earlier statutes relating to the registration

PROOF OF
OWNERSHIP.

(a) *Robertson v. French*, 4 East, 130; *Sheriff v. Cadell*, 2 Esp. 616, ante, p. 42, note (m).

of ships, which did not provide that the certificate of registry should be evidence of the matters recited in it, the certificate alone was not even *prima facie* evidence of ownership. It was necessary to show that the party sought to be charged had either assented to, or adopted the entry (b).

The later statutes have, however, made a difference with respect to the effect of the certificate of registry as evidence of ownership. The Registry Act of 1845, the 8 & 9 Vict. c. 89 (now repealed), contained provisions making copies of the registers evidence without the production of the originals (c).

Register.

By the Merchant Shipping Act, 1855, s. 15, the copy or transcript of the register of any British ship which is kept by the chief registrar of shipping at the custom house in London, or by the registrar-general of seamen (d), under the direction of her Majesty's Commissioners of Customs or of the Board of Trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript. And by the Merchant Shipping Act, 1854, sect. 107, every register of, or declaration made in pursuance of the second part of that act in respect of, any British ship may be proved either by the production of the original, or by an examined copy, or by a copy purporting to be certified under the hand of the registrar or other person having the charge of the original, and shall be received as *prima facie* proof of all the matters contained or recited in such registers or copies thereof, and of all the matters contained in or indorsed on such certificates of registry and purporting to be authenticated by the signature of a registrar (e). The form of certificate of registry now in use mentions the names of the persons who are owners at the time of registration, and the proportions in which they are interested (f). By sect. 45, all subsequent changes of ownership must be indorsed on the certificate of registry.

The usual and proper mode of proving ownership is by the

(b) *Pirie v. Anderson*, 4 Taunt. 652; *Fraser v. Hopkins*, 2 ib. 5; *Tinkler v. Walpole*, 14 East, 226. In two cases at Nisi Prius the rule was laid down without this qualification. See *Stokes v. Carne*, 2 Camp. 339; *Cox v. Reid*, R. & M. 199.

(c) See also the Law of Evidence Amendment Act (14 & 15 Vict. c. 99),

s. 12, now repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66).

(d) Now called the Registrar-General of Shipping and Seamen. See M. S. Act, 1872, s. 4.

(e) See *The Princess Charlotte*, Br. & L. 75.

(f) See Appendix, "Forms," No. 9.

production of the register or an examined or certified copy thereof (*g*), and by evidence of acts of ownership done by the alleged owner; such, for instance, as directions and interference with respect to the employment and concerns of the ship. But it will be useful to bear in mind, that the person appearing on the register as owner is not always liable to be fixed with the responsibilities of owner, whilst it frequently happens that the beneficial and not the legal owner is liable on contracts made with respect to the ship (*h*).

The first duty of the owners of a ship employed in the carriage of goods is to see that at the commencement of the voyage she is in a proper condition to perform it, and fit for the employment for which she is offered to the public or to the charterer. Whether the charter-party expressly require it or not, she must be tight, staunch and strong, and properly furnished for the voyage (*i*). Sufficient stores must be on board, and the anchors and chain-cables must be of a proper description, and fit for service; nor is it any excuse for the unseaworthiness of the

DUTIES OF OWNERS.

As to seaworthiness of ship.

(*g*) The M. S. Act, 1854, s. 107; *Hibbs v. Ross*, L. R., 1 Q. B. 534, where the question was, who was liable for the negligence of those on board. But see *Meyer v. Willis*, 18 C. B. 886. The register is *prima facie* evidence of nationality, but this may be rebutted by circumstantial evidence; *The Princess Charlotte*, Br. & L. 75. In a criminal prosecution, evidence that a vessel was a British ship and sailed under the British flag was held to be admissible, although no evidence was given that she had a British register; *Reg. v. Scherg*, L. R., 1 C. C. R. 264. The M. S. Act, 1876, s. 36, requires that the name and address of the managing owner of every British ship be registered at the custom house of the ship's port of registry. As to the effect of a similar clause in the repealed act, the 38 & 39 Vict. c. 88 (M. S. Act, 1875), see *Steel v. Lester*, 3 C. P. D. 121, at page 125.

(*h*) See *post*, p. 87 *et seq.* And see *Miller v. Potter Wilson*, 3 Sess. Cases (4th series), 105. But as to the liabilities for penalties imposed by statute, see *ante*, p. 21.

(*i*) *Lyon v. Mells*, 5 East, 428; *Wedgeburn v. Bell*, 1 Camp. 1; *Dale v. Hall*, 1 Wilson, 281; *Stanton v. Richardson*,

L. R., 7 C. P. 421; 9 *ib.* 390; *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Cohn v. Davidson*, 2 Q. B. D. 455; *Steel v. State Line Steamship Company*, 3 App. Ca. 72. In *Amies v. Stephens*, 1 Str. 128, Pratt, C. J., says, "No carrier is obliged to have a new carriage every journey; it is sufficient if he provide one which without any extraordinary accident will probably perform the journey." See also *Sharp v. Grey*, 9 Bing. 457. The rule of the American and of the Scotch law is similar; 3 Kent's Com. 216; 1 Bell's Com. 550, 4th ed. See Pothier, *Charte-Partie*, pt. 1, sect. 2, art. 2, sect. 4. As to when the ordinary statement in the charter-party that the ship is "tight, staunch, &c.," amounts to a condition precedent to the obligations of the charterer, see *Thompson v. Gillespy*, 5 E. & B. 209; *Tarrabochia v. Hickie*, 1 H. & N. 183; *Seeger v. Duthie*, 8 C. B., N. S. 45; *Behn v. Burness*, 1 B. & S. 877; 8 C. in error, 32 L. J., Q. B. 204; 3 B. & S. 751; *Stanton v. Richardson*, L. R., 7 C. P. 421; 9 C. P. 390; *Tully v. Howling*, 2 Q. B. D. 182, and *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT, Part I., and Chap. VII., INSURANCE, Part II.

ship, that the owner has been himself deceived by the ship-builder or repairer, and is ignorant of the defect (*k*).

- It is a general rule, even where there is no agreement as to time, that there must be no unreasonable or unusual delay in the commencement of the voyage (*l*).

If a ship chartered for a particular voyage becomes unseaworthy after the commencement of the voyage, it is the duty of the owner, as between himself and the freighter, to repair, if he has the opportunity, or at least not to proceed on the voyage in an unseaworthy state (*m*).

Thus far the owner's duty as to the condition of his ship arises at common law. His special statutory duties and liabilities as to tonnage admeasurement, deck and load-lines, survey, and deck loads have already been noticed in connection with registry (*n*). The Merchant Shipping Act, 1876, s. 5, provides that in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same. Provided, that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable.

By sect. 4 also of this act it is made a statutory misdemeanor, not punishable on summary conviction, for any person to send, or attempt to send, a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, unless the accused proves that he used all reasonable means to insure her being sent to sea in a seaworthy

(*k*) *Wilkie v. Geddes*, 3 Dow, 57; *Harrison v. Douglas*, 3 A. & E. 402; *Holt on Shipping*, 383; *Sharp v. Grey*, 9 Bing. 457. See also the Chain Cables and Anchors Acts, 1864, 1871, and

1874.

(*l*) *McAndrew v. Adams*, 1 Bing. N. C. 29, 38.

(*m*) *Worms v. Storey*, 11 Ex. 427.

(*n*) *Ante*, Ch. I., pp. 8, 13, 31, 37.

state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable. For the purpose of giving such proof, the accused may give evidence in the same manner as any other witness (o). A prosecution under this section may not, however, be instituted, except by or with the consent of the Board of Trade or the governor of the British possession in which such prosecution takes place (p).

Sect. 6 contains also provisions for the survey and detention of British ships unfit to proceed to sea without serious damage to human life, having regard to the nature of the service for which the ship is intended, and gives an appeal to the courts of survey appointed under its provisions (q).

A further duty is the appointment of a proper master and crew. The owners are bound, not only to the charterers and to each other, but also to all whose life and property may be embarked in the ship, to exercise a fair and impartial judgment in this respect, and to select a master and crew of competent skill (r).

Selection of master, &c.

(o) The enactment in force previously to 1875, was the M. S. Act, 1871 (34 & 35 Vict. c. 110), s. 11, repealed by the M. S. Act, 1875 (38 & 39 Vict. c. 88, s. 4, which is again repealed by the section in the text. In an indictment under the above section for sending a ship to sea in an unseaworthy state, it was held unnecessary to state that the accused knew the ship was unseaworthy or that means were not taken to make her seaworthy; *Reg. v. Freeman*, 9 Ir. L. R., C. L. 527.—C. C. R. And as to whether a British registered ship could be detained under the same section after transfer to a foreigner, but before the register had been closed, see *Granfelt v. Lord Advocate*, 1 Sess. Ca. (4th series), p. 782. See now the M. S. Act, 1876, s. 12, subs. 3. See also the repealed sections of the M. S. Act, 1873 (36 & 37 Vict. c. 85), ss. 11, 12, 13, 14, relating to the detention of ships for unseaworthiness.

(p) See s. 41, as to the consent of the Board of Trade not being required before the commencement of a prosecution under the 4th section in Scotland.

(q) See *ante*, p. 31. Former provisions contained in the M. S. Act, 1871, are repealed by the M. S. Act, 1876, s. 45, and Sched. I. part 1. The provisions now in force, enabling seamen and apprentices charged with desertion to demand a survey, will be found *post*, Chap. CREW.

(r) *Card v. Hope*, 2 B. & C. 674;

Law v. Hollingsworth, 7 T. R. 160; *Tait v. Levi*, 14 East, 481; *Forshaw v. Chabert*, 3 B. & B. 158; *Shore v. Bentall*, 7 B. & C. 798, note (b); and the judgment in *Dixon v. Sadler*, 5 M. & W. 414; *Clifford v. Hunter*, M. & M. 103; *S. C.*, 3 C. & P. 16. The precise point which was decided in the last-mentioned case, namely, that on a voyage from India to England there must be on board a mate, competent, by his skill in navigation, to take the command, in case of the accidental removal of the master, has been discussed in the American Courts, and doubts have been expressed as to its correctness. This rule has been said to be oppressive, and to be contradicted by the usage. See the observations in 3 Kent's Com. 287, and the American cases there cited. See also, *post*, Chaps. III., MASTER; VII., INSURANCE. It was held, after the passing of the 5 & 6 Will. 4, c. 19 (repealed by the 7 & 8 Vict. c. 112), that a ship was not unseaworthy because the crew, although competent and sufficient in number, were not properly hired under articles specifying the amount of wages, as required by that statute; since the violation of those provisions, which were introduced for the benefit of the seamen, only subjected the master to a penalty; *Redmond v. Smith*, 7 M. & Gr. 457. See also *Farmer v. Legg*, 7 T. R. 186; *Wilson v. Rankin*, L. R., 1 Q. B. 162; and *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581.

This is a duty not only towards others, but as between themselves, and it would seem that any contract calculated actually to interfere with it, and to fetter their judgment, would be held to be void (*s*). Where a pilot is required, it is the duty of the owners to take one on board (*t*).

Receipt of cargo.

Owners are also bound to receive on board the cargo which they have contracted to carry, and to find proper ballast for the ship. Questions have frequently arisen as to whether a freighter who has contracted to load a full cargo, which is to consist partly of light and partly of heavy goods, is bound to load heavy goods, which, by supplying the place of ballast, would enable the ship to earn more freight. This depends upon the intention of the parties, and unless there be some express or implied stipulation, or some custom of the trade to the contrary, the freighter may ship what goods he likes, and the shipowners must provide proper ballast (*u*). Merchandise may, however, be taken on board a chartered vessel as ballast, if it do not occupy more space than the ballast would have done (*v*).

Care of cargo.

When the goods have been loaded, the shipowners are, as we shall see (*x*), bound, ordinarily, to take the utmost care of them; but this liability may be narrowed by the terms of the particular contract under which they are carried, and is also in many cases diminished by statute.

Where a general ship is advertised for a particular voyage, it is the duty of the owners, if her destination is altered, to give specific notice of the change to all those who afterwards ship goods on board (*y*).

The duties of owners with respect to the carriage of passengers will be mentioned in a subsequent chapter (*z*).

LIABILITY OF OWNERS FOR LOSS OR

At common law, shipowners, like common carriers, have been treated as insurers, and made liable as such for any loss or

(*e*) See the judgment in *Card v. Hope*, 2 B. & C. 674.

(*t*) *Post*, Chap. V., *PILOT*.

(*u*) *Moorson v. Page*, 4 Camp. 103; *Irving v. Clegg*, 1 Bing. N. C. 53; *Cockburn v. Alexander*, 6 C. B. 791, and *post*, Chap. VI., *CONTRACT OF AFFREIGHTMENT*. As to the meaning of the words "full and complete cargo," see *The Southampton Steam Co. v. Clarke*, L. R., 4 Ex. 73, 6 Ex. 53; *Duckett v.*

Satterfield, L. R., 3 C. P. 227; *Morris v. Levison*, 1 C. P. D. 155; and *Gifford v. Dishington*, 9 Sess. Ca. (3rd series), 1045; and see *Borrowman v. Drayton*, 2 Ex. D. 15.

(*v*) *Towse v. Henderson*, 4 Ex. 890.

(*x*) See *post*, Chap. VI., *CONTRACT OF AFFREIGHTMENT*.

(*y*) *Peel v. Price*, 4 Camp. 243.

(*z*) *Post*, Chap. XI., *PASSENGERS*.

damage to goods intrusted to them, unless it was occasioned by the act of God, (such as storms, tempests and the like,) or of the King's enemies. They were also liable for damage done by their servants acting within the scope of their employment (a), and the law formerly exacted a full compensation out of all their property, upon the principle that persons undertaking the conveyance of goods are answerable for the conduct of the persons whom they employ, since the parties suffering damage know nothing of these persons and have no control over them (b). This general liability, however, no longer exists; it is not only usually narrowed by the express terms of the contract for carriage, but has been materially qualified by several acts of Parliament.

DAMAGE TO
GOODS AND
FOR PERSONAL
INJURIES, &c.
At common
law.

Before we refer to the Merchant Shipping Act, 1854, and the Merchant Shipping Act, 1862, which are the statutes now in force relating to this subject, it will be convenient to call attention shortly to the earlier acts which limited the liability of shipowners, although these acts are now repealed.

(a) An owner is not liable for the wrongful act of one who is employed by a stevedore who has undertaken to unload a cargo; *Murray v. Currie*, L. R., 6 C. P. 24.

(b) See *per* Lord Stowell, in *The Dundee*, 1 Hag. 121. The exception of cases of *vis major* allowed by the civil law was not recognized by the common law; Molloy, B. 2, chap. 2, s. 2. In a case in which the damage to the goods arose from one of the perils excepted in the bill of lading, but the exposure to that peril was caused by the mode in which the ship was moored during the unloading, it was held, that the shipowners were not liable if they had exercised ordinary and reasonable care; *Laurie v. Douglas*, 15 M. & W. 746. Generally speaking, there is no distinction between a land and a water carrier. See *per* Buller, J., in *Prop. of Trent Navigation v. Wood*, 3 Esp. 132, and the judgment in *Laveroni v. Drury*, 8 Ex. 170. See, however, upon the question whether a ship-owner is a common carrier, *The Duero*, L. R., 2 A. & E. 293; *Nugent v. Smith*, 1 C. P. D. 19, 423. In this case, on appeal, Cockburn, C. J., after dealing with a great body of law, civil and English, came to the conclusion that the owner of a general ship was not a common carrier, and that barge owners are liable as common carriers. See *The Liver Alkali Co. v. Johnson*, L. R., 7 Ex. 267;

9 Ib. 338. As to whether shipowners carrying passengers beyond the seas are strictly common carriers, see *Benett v. The Peninsular Steam Boat Company*, 6 C. B. 775. The fact that a carrier's terminus *ad quem* is without the realm does not relieve him from the liabilities of a common carrier; *Crouch v. The London and North-Western Railway Company*, 14 C. B. 255. The Carriers Act, the 11 Geo. 4 & 1 Will. 4, c. 68, protects carriers who have contracted to carry goods partly by land and partly by water, where the loss occurs on the land; *Pianciani v. The London and South-Western Railway Company*, 18 C. B. 226; *The Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moore, P. C. C., N. S. 272; *Le Couteur v. South-Western Railway Company*, 6 B. & S. 961. The shipowner is liable to a pilot who he is compelled to employ for an injury caused by negligence of the crew; *Smith v. Steele*, 10 L. R., Q. B. 125. It has been held in Ireland that the master is not a fellow-servant of the sailors, and therefore that the owner is liable to the sailors for the negligence of the master; *Ramsay v. Quin*, 8 Ir. L. R., C. L. 322. But see *Liedy v. Gibson*, 11 Sess. Ca. (3rd series) 304. See, also, *Sutton v. Mitchell*, 1 T. R., 18; and *Wilson v. Merry*, L. R., 1 H. L. Sc. 326.

Under the
earlier sta-
tutes.

By the 7 Geo. 2, c. 15 (c), the liability of owners for loss or damage by reason of the embezzling, secreting or making away with by the master or mariners, without their knowledge or privity, of any goods or merchandize, was limited to the value of the ship and appurtenances, and to the full amount of the freight.

This act, however, only protected the owners in cases of loss happening through the acts of the master or mariners. A subsequent act, the 26 Geo. 3, c. 86, extended the protection to cases in which the loss was not so caused, limiting the liability of the owners for losses happening without their privity or knowledge, to the value of the ship and all her appurtenances, and the full amount of the freight due, or to grow due, for the voyage whereon the loss occurred (d).

The last-mentioned act also exempted the owners from liability for any loss or damage to any goods taken on board, by reason of fire on board (e); and protected both the master and the owners from responsibility for the loss or damage of gold, silver, watches, jewels or precious stones put on board, by reason of any robbery, embezzlement, secreting or making away with them; unless their true nature and value had been inserted in the bill of lading, or otherwise declared in writing by the owner or shipper to the master or owners at the time of the shipment (f).

These acts, however, expressly reserved all remedies against the master and mariners for their own wrongful acts (g).

By a later act, the 53 Geo. 3, c. 159, shipowners were protected from liability for any loss or damage arising by reason of any act, neglect, matter, or thing done, omitted or occasioned without their fault or privity, happening to any goods, wares or merchandize, or other things laden on board, or to any goods, &c. on board any other ship, or to any other ship, further than the value of the ship, and of the freight due, or growing due,

(c) This act was passed in consequence of the case of *Boucher v. Lawson*, Rep. temp. Hardw. 85, where the owners were held liable for the loss of goods through the negligence or embezzlement of the master. See *per Buller, J.*, in *Yates v. Hall*, 1 T. R. 78. It was held under this act that the words were wide enough to limit the liability of the owners for a robbery committed by strangers in concert with

one of the mariners who shared in the spoil; *Sutton v. Mitchell*, 1 T. R. 18.

(d) The 26 Geo. 3, c. 86, s. 1. This act related only to ships usually employed in sea voyages; *Hunter v. McGowan*, 1 Bligh, 573.

(e) *Ib.* s. 2.

(f) *Ib.* s. 3.

(g) The 7 Geo. 2, c. 15, s. 4; the 26 Geo. 3, c. 86, s. 5.

for the voyage in prosecution, or contracted for at the time of the loss (h).

All these acts are now repealed (i), and the statutes which regulate the liability of shipowners, in the cases to which the earlier acts referred, are the Merchant Shipping Act, 1854, and the Merchant Shipping Act, 1862. Under the M. S. Acts, 1854 and 1862.

The ninth part of the earlier of these acts relates to the liability of shipowners, and contains provisions, some of which have been altered by the later statute. The statutory provisions now in force, and which are contained partly in one act, and partly in the other, are as follows :

By sect. 503 of the Merchant Shipping Act, 1854, the owners of sea-going ships (j) are not liable to any extent whatever, for loss of or damage happening without their actual fault or privity to

- (1.) Any goods, merchandize or other things taken or put on board, by reason of any fire happening on board (k). For fire.

(h) The 53 Geo. 3, c. 159, s. 1. In estimating the value of the ship within the meaning of this act, fishing stores carried on board, not as merchandize, but for the accomplishment of the objects of the voyage, were considered to be included ; indeed, whatever was on board for the object of the voyage and adventure, belonging to the owners, was held to constitute a part of the ship and appurtenances ; *per* Abbott, C. J., in *Gale v. Laurie*, 5 B. & C. at page 164. In calculating the value of the freight, money actually paid in advance was taken into account ; *Wilson v. Dickson*, 2 B. & A. 2. And where the completion of the voyage was prevented by the tortious sale of the ship, the extent to which the owners were held to be liable was the value of the ship at the time of the sale, and the freight she would have earned had she completed the voyage, not the amount which was calculated on at its commencement ; *Cannan v. Meadburn*, 1 Bing. 465. Where one of several owners was also master, and a loss occurred by his misconduct, it was held that his innocent co-owners were protected, but that he himself was not ; *Wilson v. Dickson*, *ubi sup.* ; *The Triune*, 3 Hagg. 114. It was provided by this act that the value of the carriage of any goods belonging to the owners, and the hire due or to grow

due under any contract (except, in the case of ships hired for time, hire which did not begin to be earned until the expiration of six calendar months after the loss), should be considered as freight for the purposes of this act, and of the two earlier acts which are mentioned above. The policy of this act is obvious ; it made the owners liable for the acts of the master and mariners so far as they themselves had trusted them, that is, to the value of the ship and freight, but not beyond. See *per* Buller, J., in *Sutton v. Mitchell*, 1 T. R. 20.

(i) See the M. S. Repeal Act, 1854, which was passed on the 11th August, 1854, and repealed the earlier acts mentioned in the text ; providing, however, expressly that such repeal should not affect liabilities accruing under them before that act should come into operation, that is to say, before the 1st May, 1855. See ss. 3, 4 and 14.

(j) This section applies only to British ships ; *The General Screw Collier Company v. Schurmanns*, 29 L. J., Ch. 877. The act does not define the meaning of the term "sea-going ships." By s. 2, the word "ships" includes every description of vessel used in navigation not propelled by oars. In *Ex parte Ferguson*, L. R., 6 Q. B. 280, a fishing coble was held to be a ship.

(k) Where a bill of lading contained

For robbery,
&c.

- (2.) Any gold, silver, diamonds, watches, jewels or precious stones taken or put on board, *by reason of any robbery, embezzlement, making away with or secreting thereof*:— unless the owner or shipper has at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of the ship, the true nature and value of such articles (1).

By s. 54 of the Merchant Shipping Act Amendment Act, 1862 (m), the owners (n) of any ship, whether British (o) or foreign, are not answerable in damages where all or any of

an exception of "fire on board," and the goods carried under it were injured in consequence of the water used to extinguish a fire occurring during the voyage, it was held that the exception and the section of the act had reference only to the obligation to deliver the goods, and did not take away the ordinary liability of the shipowner to general average contribution when a sacrifice had been made for the benefit of the adventure; *Schmidt v. The Royal Mail Steam Ship Company*, 45 L. J., Q. B. D. 646. The protection afforded by the 26 Geo. 3, c. 86, s. 2, in cases of fire, was confined to cases in which the fire arose on board the ship, and, consequently, did not extend to a casual fire occurring on board a lighter employed by the shipowners to convey the goods from the shore to the ship; *Morewood v. Pollok*, 1 E. & B. 743.

(l) It has been held under this section that it is not sufficient to describe a parcel of gold as so much "gold dust," without stating its value. *Williams v. The African Steam Ship Company*, 1 H. & N. 300.

(m) The protection given by the M. S. Act, 1854, was confined to sea-going ships, and the limit of the owner's liability was the value of the ship and freight due or to grow due during the voyage under prosecution or contracted for; subject, however, to the provision that in cases in which the liability was incurred in respect of loss of life or personal injury to a passenger, the value of the ship and freight was not to be taken at less than 15*l.* per registered ton; the M. S. Act, 1854, s. 504. As to the construction of this act, see *Nixon v. Roberts*, 30 L. J., Ch. 844. This statute also provided, by s. 505, that the freight was to be deemed to include the value

of the carriage of any goods or merchandize belonging to the owners of the ship, passage-money, and also the hire due or to grow due under any contract, except only such hire (in the case of a ship hired for time) as might not begin to be earned until the expiration of six months after the loss or damage. Both these sections are now repealed by the M. S. Act, 1862. The value of a ship for the purposes of the earlier statutes was considered to be the price for which he would have sold immediately before her loss, unless she was a ship of an exceptional character only wanted for special purposes (see *The African Steam Ship Company v. Swanzy*, 2 K. & J. 660; 25 L. J., Ch. 870; and *Grainger v. Martin*, 2 B. & S. 456), without deduction in respect of costs of sale; *Leycester v. Logan*, 4 K. & J. 725. See also *Wilson v. Dickson*, 2 B. & A. 2; *Dobree v. Schroder*, 6 Sim. 291. In *Dobree v. Schroder*, 2 Myl. & C. 489, it was held that the value of the ship was the price at which she could be sold, and that it was to be ascertained, not by making deductions from the cost price proportioned to her age, but by a valuation and appraisement.

(n) This includes unregistered as well as registered owners; *The Spirit of the Ocean*, Br. & L. 336. A railway company carrying goods and passengers partly by sea and partly by land is entitled to the benefit conferred by these sections; *London and South-Western Railway v. James*, L. R., 8 Ch. 241.

(o) It has recently been held that in the case of British ships requiring registration the section has no application if the ship is unregistered at the time of the damage done; *The Andalusian*, 3 F. D. 182.

the following events occur without their actual fault or privity (*p*):—

- (1.) Where any loss of life or personal injury is caused to any person being carried in the ship (*q*); For loss of life or personal injury.
- (2.) Where any damage or loss is caused to any goods, merchandize or other things whatsoever on board the ship;
- (3.) Where any loss of life or personal injury is by reason of the improper navigation (*r*) of the ship caused to any person carried in any other ship or boat;
- (4.) Where any loss or damage is by reason of any such improper navigation caused to any other ship or boat (*s*), or to any goods, merchandize or other thing whatsoever on board any other ship or boat;— For injury to goods or ships.

beyond the following amounts:—

Where loss of life or personal injury has occurred, either alone or together with loss or damage to ships, boats, goods, merchandize or other things, the limit of the owner's liability is 15*l*. for each ton of the ship's tonnage; and where the injury complained of is in respect of loss or damage to ships, goods, merchandize or other things, the limit is 8*l*. for each ton (*t*).

The tonnage upon which the extent of liability is in these cases to be calculated is, in the case of sailing ships, the registered tonnage, and in the case of steam ships, the gross tonnage,

(*p*) The fact that the collision happened by the fault of the master, whose name was on the register as part owner of the ship, but who had parted with his shares before the collision by an unregistered bill of sale, does not defeat the right of his transferee and the other owners to have their liability limited; *The Spirit of the Ocean*, Br. & L. 161; see also *The Obey*, L. R., 1 A. & E. 102; *Kidston's Executors v. M'Arthur's Executors*, 5 Sess. Ca. (4th series), p. 936.

(*q*) This limitation applies to claims under Lord Campbell's Act; *Glaholm v. Barker*, L. R., 2 Eq. 598; 1 Ch. 223.

(*r*) As to the meaning of these words see *Good v. The London Steam Ship-owners Association*, L. R., 6 C. P. 563.

(*s*) Damage to a vessel being towed, caused by the improper navigation of the tug, is within this section; *Wahlberg v. Young*, 45 L. J. 783.

(*t*) The M. S. Act, 1862, s. 54. In construing these provisions it has been held that the damages are to be ascertained in the same way as if the liability of the owners were unlimited, and then the sum for which the owner is liable is to be applied in payment of the damages when so ascertained and distributed rateably. *Glaholm v. Barker*, L. R., 2 Eq. 598; 1 Ch. 223. In a case where two ships, the *V.* and the *S.*, came into collision, and both were held to blame, the *V.* had sustained damage the half of which exceeded the statutory limit of the liability of the *S.*, and the half of the damage sustained by the *S.* did not exceed the statutory limit of the liability of the *V.*; it was held, that the owner of the *S.* might claim the benefit of limited liability and yet recover the half of the damages sustained by the *S.* against the owner of the *V.* without deduction. *Chapman v. The Royal Netherlands Steam Co.*, Weekly Notes, 29th March, 1879.

without deduction on account of engine room (*u*). In the case of foreign ships which have been or can be measured according to British law, the act provides that the tonnage, as ascertained by such measurement, is to be deemed, for these purposes, the tonnage of the ship; and that in the case of other foreign ships, which have not been and cannot be measured under British law, the tonnage is to be ascertained by a certificate from the surveyor general of tonnage in the United Kingdom, or from the chief measuring officer in any British possession abroad (*x*).

Insurances effected against any of the events enumerated in the above section, and occurring *without the actual fault or privity of the shipowner*, are valid (*y*).

By sect. 506 of the Merchant Shipping Act, 1854, it is provided that the owners of every sea-going ship shall be liable in respect of every loss of life, personal injury, loss of or damage to goods as is mentioned above, which may arise on distinct occasions, to the same extent as if no other loss, injury or damage had arisen (*z*).

The owners are liable to pay interest beyond the amount fixed by statute (*a*). If the ship injured is in ballast, the interest is calculated from the date of the collision (*b*).

Ships to
which pro-
tection of sta-
tutes extend.

The provisions of the Merchant Shipping Act, 1854, limiting the liability of owners, were declared by sect. 516 not to extend to British ships not being recognized British ships within the meaning of that statute (*c*). As the limitations of the owner's liability where a fire occurs on board ship, and where gold, silver, watches, jewels and precious stones are stolen or em-

(*u*) The provisions for the deduction of crew space (*supra*, p. 8) are to be taken into consideration in calculating the gross tonnage; *Burrell v. Simpson*, 4 Sess. Ca. (4th series), p. 177.

(*x*) The M. S. Act, 1862, s. 54.

(*y*) *Ib.* s. 55. See also *Good v. The London Shipowners Association*, L. R., 6 C. P. 563.

(*z*) Where one ship causes damage to more than one other at the same time, on the same occasion, it will be deemed one act of damage; *The Rajah*, L. R., 3 A. & E. 539. In any proceeding under this section, against the owner of a ship or share, in respect of loss of life, the master's list, or the duplicate list of passengers delivered

to the proper officer of customs under s. 16 of the Passengers Act, 1855, is, in the absence of proof to the contrary, sufficient proof that the persons in respect of whose death the proceeding is instituted were passengers on board of the ship at the time of their deaths; the M. S. Act, 1862, s. 56.

(*a*) *The Northumbria*, L. R., 3 A. & E. 6; *Smith v. Kirby*, 1 Q. B. D. 131.

(*b*) *Straker v. Hartland*, 2 H. & N. 570; 34 L. J., Ch. 122.

(*c*) See *Cope v. Doherty*, 4 K. & J. 357; 2 De G. & J. 614; and *ante*, p. 3. No ship required to be registered is to be recognized as a British ship unless registered. See the M. S. Act, 1854, s. 19. See also *The Andalusian*, 3 P. D. 182.

bezzled, still depend upon sect. 503 of that act, the statutory protection does not extend, in those cases, to foreign ships. But we have already seen (*d*) that the provisions limiting the liability of shipowners, which are contained in the Merchant Shipping Act, 1862, mentioned above (*e*), are applicable not only to recognized British ships but also to all foreign ships.

These limitations of the owner's responsibility rest, in England, upon the authority of the statute law only, for the common law, like the civil law in this respect, held the shipowner to be responsible in all these cases. By the general law, however, of the maritime nations of continental Europe, the liability of owners for the wrongful acts of the master is limited to the value of the ship and freight, and they may discharge themselves by abandoning them to the creditor (*f*).

We shall see in subsequent Chapters how far the responsibility of owners is limited by the express terms of the ordinary contract for carriage, and by the operation of the provisions of the Merchant Shipping Act, 1854, relating to pilots; and also what bearing the statutes to which we have referred have upon questions of collision (*g*).

Liability
under Pilot
Acts, &c.

In cases of loss of life or personal injury of the class mentioned above, the Merchant Shipping Act, 1854, empowers the Board of Trade to institute an inquiry, and provides in detail for the recovery of damages before the sheriff and a jury (*h*), and until the completion of such inquiry, or the refusal of the Board to institute it, no action can be maintained (*i*).

Board of
Trade in-
quiry.

It was expressly provided by the Merchant Shipping Act, 1854, that the provisions in the ninth part of the act (which refer, as is mentioned above, to the liability of shipowners) should not lessen or take away any liability to which any master

(*d*) *Ante*, p. 80.

(*e*) *Per* Abbott, C. J., in *Gale v. Lawrie*, 5 B. & C. 164; *per* Lord Stowell, in *The Dundee*, 1 Hagg. 121. It is the same in America, 3 Kent's Comm. 217.

(*f*) See *Émérigon*, *Contrats à la Grosse*, c. 4, s. 11, where the early maritime laws are cited. Boulay Paty, *Cours de Droit Commercial Maritime*, vol. i. tit. 3, sect. 1 (Ed. 1834); *Code de Comm.* art. 216. See *Lloyd v. Guibert*, L. R., 1 Q. B. 115.

(*g*) See *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT; Chap. V., PILOT; Chap. IX., COLLISION.

(*h*) The provisions of the act in this respect will be found in ss. 507—515. See Appendix, p. cxlviii. They have seldom, if ever, been put in force. Of late years it has been the universal practice of the Board of Trade to refuse to take proceedings under these sections.

(*i*) The M. S. Act, 1854, s. 512.

or seaman, being also owner or part owner of the ship to which he belonged, was subject in his capacity of master or seaman (*l*); this stipulation is not repeated in the Merchant Shipping Act, 1862, which now defines, as we have seen, the liability of ship-owners in cases of loss of life, personal injury, and loss or damage to goods. But as the section of the Merchant Shipping Act, 1854, which contains this provision, is not repealed by the later act, and the later act is (by sect. 1) to be construed with and as part of the earlier act, it is doubtless intended that this limitation to the protection afforded to shipowners shall apply to their liability, as defined in the Merchant Shipping Act, 1862.

Jurisdiction
of Courts with
respect to
limitation and
distribution
of amount.

The powers given by sect. 514 of the Merchant Shipping Act, 1854, to the Court of Chancery, enable that Court to determine the amount of a shipowner's liability, and to distribute that amount among the several claimants, and to stop all actions relating to the same subject matter (*m*).

By the Common Law Procedure Act, 1860 (*n*), the Superior Courts of Common Law, and any judge thereof, may, upon summary application by rule or order, exercise such and the like jurisdiction as may be exercised by the Court of Chancery, under the provisions of the ninth part of the Merchant Shipping Act, 1854.

The Admiralty Court Act, 1861, (24 Vict. c. 10, s. 13,) further provides that, whenever any ship or the proceeds thereof are under the arrest of the Admiralty Court (*o*), it shall have the same powers as are conferred upon the Court of Chancery by the ninth part of the Merchant Shipping Act, 1854.

The Court of Chancery decided that the above-mentioned section of the Merchant Shipping Act conferred upon it power simply to determine the amount of the liability of the shipowner, and that as it had no jurisdiction to determine the question whether the shipowner was or was not liable, it would

(*l*) The M. S. Act, 1854, s. 516.

(*m*) *Leycester v. Logan*, 3 K. & J. 446. The costs of the suit must be borne by the plaintiff, so also must the costs of actions stopped; *The African Steam Ship Company v. Swanzy*, 2 K. & J. 660.

(*n*) The 23 & 24 Vict. c. 26, s. 35.

(*o*) In a case before the Judicature Act where the owners of a vessel, which had been sunk at sea in a collision, instituted a suit in the Admiralty Court

for the limitation of their liability, and paid into the registry of the Court a sum of money in lieu of bail, the Court of Exchequer granted a prohibition, holding that the vessel or proceeds were not under arrest, because the money paid in did not represent the vessel and was not paid in to save the vessel from arrest; *James v. London and South Western Railway Co.*, L. R., 7 Ex. 187, on appeal, 287.

not grant relief unless the shipowner admitted his liability. But it was afterwards held in the Admiralty Court, that it is not requisite that the owner of a ship preferring a claim in that Court to limited liability, should begin by acknowledging that his vessel is to blame, and it is now the practice in the Admiralty Division to allow a shipowner to institute a suit for limitation of liability, without requiring him to admit his liability (*p*).

There are some claims which may be enforced in Courts having admiralty jurisdiction by proceedings against the ship, her cargo, and freight, or against the ship only, or against the cargo only. These proceedings are commonly called proceedings *in rem* (*q*), and are commenced by process served upon the *res* (*r*), and are usually followed up by the arrest of the *res*. This process is considered to be notice to all persons having any interest in the *res*, and all such persons are therefore entitled to appear as defendants, and are concluded by the judgment of the Court, at least to the extent of their interest in the property proceeded against (*s*).

LIABILITY OF
OWNERS AS
DEFENDANTS
IN ACTIONS IN
REM.

Proceedings of this nature were originally founded, and still to a great extent depend, upon a privilege called a maritime lien, which by maritime law is established in favour of certain classes of persons to have their demands against the owners of the *res* satisfied out of the proceeds of the *res* in priority to other claimants (*t*). Where a maritime lien attaches it travels with the property into whosoever possession it may come, and when enforced by legal process relates back to the period when it first attached (*u*). If enforced with reasonable diligence it will hold good against the claim of a *bonâ fide* purchaser without notice (*x*).

Maritime
lien.

(*p*) *Hill v. Audus*, 1 K. & J. 263; 24 L. J., Ch. 229; *The Amalia*, Br. & L. 151. The case went on appeal to the Privy Council, and the decision below was affirmed; but the objection to the decision below on the point now in question seems not to have been insisted upon on the argument of the appeal. See *The Sisters*, 1 P. D. 281. See also *Miller v. Powell*, 2 Sess. Ca. (4th series), 976. But see the judgment of Kelly, C. B., in *James v. London and South Western Railway Co.*, L. R., 7 Ex. at page 196.

(*q*) *The Bold Buccleugh*, 7 Moo. P. C. C. 167.

(*r*) Supreme Court of Judicature Act, 1876, Schedule, Order IX. sect. 10.

(*s*) *The Eliza Cornish*, 1 Spinks, 58; *Castrique v. Imrie*, L. R., 4 H. L. 414.

(*t*) *The Two Ellens*, L. R., 4 P. C. 161; *The Piece Superiore*, L. R., 5 P. C. 482.

(*u*) *The Bold Buccleugh*, 7 Moo. P. C. C. 267.

(*x*) *The Nymph*, Swa. 86; *The Charles Amelia*, L. R., 2 A. & E. 330.

The matters which give rise to a maritime lien are considered in detail under their various headings, and at present it is not necessary to do more than simply to refer to them. A maritime lien attaches in cases of collision between ships to the ship which is to blame for the collision in favour of the persons who have sustained damage by the collision (*y*), to the extent of the damage so sustained by them (*z*); it attaches to salvaged property in favour of salvors, to the extent of the salvage remuneration to which they are entitled (*a*). A bottomry bondholder is entitled to a maritime lien on the ship or cargo hypothecated (*b*). A seaman is entitled to a maritime lien on the ship or freight in respect of his wages (*c*), and a ship-master in respect of his wages and disbursements (*d*). Towage and pilotage confer a maritime lien (*e*). A person who furnishes in a British port necessaries to a foreign ship has a maritime lien on the ship for the price of the necessaries (*f*). The question whether a registered mortgagee of a ship has a maritime lien on the ship for the amount due in respect of his mortgage has never been decided (*g*).

In some cases the legislature has by recent statutes conferred a right to proceed *in rem* without giving a maritime lien. Thus, under the 6th section of the Admiralty Court Act, 1861, which gives a right in certain cases to the owner of cargo carried into any port of England or Wales to proceed *in rem* against the ship for damage done to the cargo by breach of duty or breach of contract on the part of the owner or master or crew of the ship, no lien attaches until the institution of the suit (*h*); and a similar construction has been put upon the provisions of the 5th section of the Admiralty Court Act, 1861, which confers upon a person who has supplied necessaries to a ship elsewhere than in the port to where she belongs a right, under certain conditions, to proceed against the ship to recover the price of the necessaries. So, also, it has been held that the 4th section of

(*y*) *The Alene*, 1 W. Rob. 111; *The Europa*, Br. & L. 89.

(*z*) *The Hally*, L. R., 2 P. C. 193.

(*a*) *The Fusilier*, Br. & L. 341; *The Cargo ex Schiller*, 2 P. D. 145; *The W. A. Safford*, Lush. 69; *The Gustaf*, Lush. 506.

(*b*) *The Hersey*, 3 Hagg. 407; *The Royal Arch*, Swa. 285.

(*c*) *The Margaret*, 3 Hagg. 240; *The Salacia*, Lush. 545.

(*d*) *The Peronia*, L. R., 2 A. & E. 65;

The Jenny Lind, L. R., 3 A. & E. 529.

(*e*) *The Constanca*, 10 Jurist, 845.

(*f*) The 3 & 4 Vict. c. 65, s. 6; *The Ella A. Clark*, Br. & L. 32; *The Two Ellens*, L. R., 4 P. C. 161. - *flamuch* *Spon*

(*g*) The Admiralty Court Act, 1861, ss. 11, 35; *The Pacific*, Br. & L. 243; *The Chieftain*, Br. & L. 104; *The Mary Ann*, L. R., 1 A. & E. 8. But see *The Scio*, L. R., 1 A. & E. 353.

(*h*) *The Piece Superiore*, L. R., 6 P. C. 482.

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could

the Admiralty Court Act, 1861, does not confer a maritime lien in the cases falling within its provisions in favour of persons who have claims for the building, equipping, or repairing of a ship (i).

We proceed to consider the liability of the owners for work and repairs done, and for stores furnished to the ship. In considering this subject, it is important to recollect that legal ownership by itself does not create any liability for the ship's debts. Strictly speaking, no liability arises from the mere fact of ownership (k). Some misapprehension on this point existed formerly, but it is now settled that the question as to the liability for repairs and necessities is to be dealt with in the same way as before the passing of the Registry Acts, and that the inquiry always is, who made the contract? upon whose credit was the work done? and upon these questions the statutes requiring registration, which have been in force from time to time, have directly no bearing (l), though indirectly their operation is fre-

LIABILITY
FOR REPAIRS
AND NECESS-
ARIES.

No liability
by reason of
mere legal
ownership.

(i) *The Pacific*, Br. & L. 246; *The Two Ellens*, L. R., 4 P. C. 161.

(k) *Per Bayley, J.*, in *Briggs v. Wilkinson*, 7 B. & C. 35. See also Holt on Shipping, 197. As to the liability of owners for necessities in Scotland see *Miller v. Potter, Wilson & Co.*, 3 Sess. Ca. (4th series), p. 105.

(l) *Briggs v. Wilkinson*, 7 B. & C. 30; 3 Kent's Com. 133; *Reeve v. Davis*, 1 A. & E. 312; *Jennings v. Griffiths*, R. & Moo. 43; *Young v. Brander*, 8 East, 10; *Westerdell v. Dale*, 7 T. R. 306; *Annett v. Carstairs*, 3 Camp. 354; *Rennie v. Young*, 2 De G. & J. 136; *The Great Eastern*, L. R., 2 A. & E. 88; *Gunn v. Roberts*, L. R., 9 C. P. 331. In the analogous case of a person whose name appeared in the Stamp Office return as a proprietor of a newspaper, he was held not to be therefore liable in respect of a contract relating to it, made after his interest had ceased, and, in fact, by other parties. *Holcroft v. Higgins*, 2 C. B. 488. (The sections of the act upon which this case was decided, 6 & 7 Will. 4, c. 76, ss. 6, 8, have been repealed by 32 & 33 Vict. c. 24.) In some cases registered ownership has been treated as creating a *prima facie* liability; *Cox v. Reid*, 1 C. & P. 602; *Ex parte Machell*, 2 Ves. & B. 216, and see the judgments in *Frost v. Oliver*, 2 E. & B. 301, and *Hibbs v. Ross*, L. R., 1 Q. B. 534. Whether this be strictly accurate may be

doubted, but it is admitted on all hands, that if there be such a *prima facie* liability, it is not conclusive, but may be rebutted by the special circumstances of each case. In *Rich v. Coe*, 2 Cowp. 639, Lord Mansfield said, "Whoever supplies a ship with necessities has a treble security: 1, the person of the master; 2, the specific ship; 3, the personal security of the owners, whether they know of the supply or not." It must be recollected, however, that if this observation includes mere legal owners, the latter decisions establish that they are not liable, unless the contract is shown to be made with their express or implied authority; and, further, that there may be cases in which the master, acting as agent for the owners, incurs no personal liability; as, for instance, where no credit is given to him, or there is an express stipulation that he shall not be personally liable. It is perfectly open to the parties to contract, so as to confine the responsibility either to the master or the owner. *Hoskins v. Slayton*, Rep. temp. Hardw. 376; *Farmerv. Davies*, 1 T. R. 108; and see the observations of Lord Ellenborough, C. J., in *Hussey v. Christie*, 9 East, 432; *Story on Agency*, ss. 294, 296. In the words of an early case, "The repairer of a ship has *prima facie* his election to sue the master who employs him, or the owners; but if he

See v.
Contribution
62 B. O. 93.

quently important, as the repairs are usually done by the legal owner. In other words, the legal owner is liable, not because he is the registered owner, but because he is in most cases the real contractor.

It will be found accordingly that parties have been held liable, because the work was done on their credit, although they had parted with their shares; and that, on the other hand, a similar liability has attached upon persons beneficially interested, but not entitled under any legal transfer.

These rules have been often recognized, and have been acted upon in some important recent cases. They apply to the cases of mortgagees and lessees of ships, who are, in fact, so far as this question is concerned, limited or temporary owners (*m*). The difficulty in practice has always been to apply these principles to the complicated facts of particular cases.

In the decided cases the attempt has generally been either to infer a liability from mere registered ownership, or to show that the persons personally engaged in the transaction were clothed with some express or implied authority from the parties sought to be charged (*n*).

Thus, where the managing owner mortgaged his interest, and the mortgagee caused the transfer to be duly indorsed on the certificate of registry, but the mortgagor continued, as before, to manage the concerns of the ship, and the mortgagee did not interfere or take possession, it was held, that he was not liable for repairs and necessities supplied under the orders of the mortgagor (*o*); and a mortgagor who remains in possession of the ship may confer upon a material man a possessory lien against

undertakes it on a special promise from either, the other is discharged." *Garnham v. Bennett*, 2 Str. 816. The master is liable, in the first instance, if it does not appear that any credit was given to the owners; *per* Tindal, C. J., in *Essery v. Cobb*, 5 C. & P. 358. See *Priestley v. Fernie*, 34 L. J., Ex. 172. A person who accepts a transfer of shares in a ship does not thereby become liable for necessities supplied to her, though he had notice of a claim made for them. *The Aneroid*, 2 P. D. 189.

(*m*) *Briggs v. Wilkinson*, 7 B. & C. 30. See as to when the charterer becomes owner *pro hoc vice*, the cases cited *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT, and *Parish v. Crawford*, 2 Stra. 1251; *Vallejo v. Wheeler*,

Cowp. 143. As to the enforcement of equities against owners and mortgagees of ships in respect of their equitable interests therein, see the M. S. Act, 1862, s. 3, and *ante*, p. 55.

(*n*) In *The Troubadour*, L. R., 1 A. & E. 302, Dr. Lushington said, "The mortgagee in possession would not be liable for necessities supplied to the ship, unless the master in ordering the necessities was acting as the agent for such mortgagee."

(*o*) *Briggs v. Wilkinson*, 7 B. & C. 30. See also as to the position and rights of mortgagor and mortgagee, where the latter is not in possession, *per* Willes, J., in *Johnson v. The Royal Mail Steam Packet Company*, L. R., 3 C. P. 42; and *Collins v. Lamport*, 4 De Gex, J. & S. 500; 34 L. J., Ch. 196.

her for necessary repairs (*p*). So, on the other hand, where a legal owner parted with a beneficial ownership, by contracting to sell his shares, and by taking a bill of exchange for part of the price, and before a bill of sale had been executed, repairs were done by the directions of the managing owner, and there was no evidence to show that he had any authority from the legal owner to order them, it was held, that the latter was not liable (*q*); and in accordance with this principle, a person who holds himself out as owner cannot escape from liability by setting up that the conveyance to him was void for non-conformity with the provisions of the Registry Acts (*r*). In a case in bankruptcy (*s*), the rule was laid down by Lord Eldon in these terms, "Where the repairs are executed in a port in this country, the vessel, till parted with, is specifically chargeable with their amount; but the lien is lost with the possession. Where the repairs are ordered by the master, he, in the first place, incurs a personal liability; and considering him in general as the servant or agent of the owners in the employment and management of the ship, they also become responsible for his orders, unless they are expressly excluded by the terms of the contract. The same observation applies where a part owner gives the order; the liability attaches against them all, unless it be expressly provided against."

Liability of beneficial owners.

These principles receive considerable illustration from some modern cases. In one of these (*t*) the legal owner of a ship was sued for the price of rigging supplied subsequently to the execution by him of an invalid executory contract for the sale of the ship. The rigging was necessary, and had been supplied to the ship whilst she was in dock in London, on the order of the acting and registered master. The defendant was at this time the registered owner. The plaintiff had, about the time of the supply of the goods (but whether before or after was uncertain), inspected the register. Before the goods were supplied the defendant had entered into an agreement (which was, by reason of the Registration Acts then in force, not binding, as it did

Cases illustrating the principles applicable to the liability of owners.

(*p*) *Williams v. Allsup*, 10 C. B., N. S. 417; 30 L. J., C. P. 353.

(*q*) *Curling v. Robertson*, 7 M. & Gr. 336; *Baker v. Buckle*, 7 Moore, 349.

(*r*) *Harrington v. Fry*, 2 Bing. 179. In this case the defendant was held not to be liable. The decision has been questioned, on the ground that he was, as regarded strangers, sub-

stantially a dormant or secret part owner, and that credit given to one part owner is credit given to all. See Collyer on Part. 686; see also *McIver v. Humble*, 16 East, 169.

(*s*) *Ex parte Bland*, 2 Rose, 92. See also *Thompson v. Finden*, 4 C. & P. 158.

(*t*) *Frost v. Oliver*, 2 E. & B. 301.

not recite the certificate of registration) to sell the ship to a third person, to be employed as an emigrant ship, the defendant agreeing to repair her so that she should be approved of by the Emigration Commissioners. The master had been appointed by the intended purchaser, and the defendant had never seen him or desired him to order anything for the ship; but there was evidence to show that the name of the master had been put on the register with the concurrence of the defendant, and that whilst he was acting as master the defendant had, concurrently with the purchaser, kept possession of the ship, having on board of her agents who gave orders respecting other repairs which were being done to her. It appeared, also, that the dock dues had been paid by the defendant; that the ship, whilst in dock, had been new coppered, and had had other rigging supplied to her at the expense of the defendant, and that the rigging in respect of which the action was brought ought to have been supplied by the defendant, under the agreement between him and the intended purchaser; and that some time after the supply of the rigging, the contract of purchase not having been completed, the defendant took exclusive possession of the ship, and sent her abroad under another master, carrying with her the cordage in question. Upon these facts the judges differed as to whether there was any evidence that the rigging had been supplied on the credit of the defendant, or that he had given authority to the master to pledge his credit. Lord Campbell, C. J., and Wightman and Crompton, JJ., were of opinion that there was evidence to go to the jury of his liability. Erle, J., was of a contrary opinion, holding that the evidence showed, in fact, a contract by the master on behalf of the purchaser who had appointed him, and that there was no evidence from which it could be inferred that the master had authority to bind the legal owner. Shortly after this case an action was brought against the same defendant by another tradesman for goods supplied to the same ship upon the order of the master, under substantially similar circumstances (*u*). The case was tried before Lord Campbell, C. J., and he directed the jury that the defendant was not liable merely by reason of his being the registered owner, nor was he liable merely by the orders having been given by the registered master, but that he was liable if the master had acted with his privity and consent, and the

(*u*) *Mitcheson v. Oliver*, 5 E. & B. 419.

goods had been supplied upon the credit of the owner by the *bonâ fide* orders of the master, given with the privity of the owner, and were necessary and proper for the ship under the circumstances; and that, although the facts given in evidence by the defendant were believed, he was not conclusively entitled in point of law to a verdict. To this ruling a bill of exceptions was tendered, and the Court of Exchequer Chamber directed a new trial, holding that the direction was not sufficient, and that there was no evidence that the master had acted as the *defendant's* master of the ship. The Court, after referring to the direction given to the jury as to the circumstances under which they might find the defendant liable, proceeded in the following terms:—"Now we think that, although these circumstances existed, yet it would not be enough to render the defendant liable unless the person acted as *the defendant's* master of the ship with his privity and consent, and the goods and work were supplied to and done upon the ship, not merely upon *the credit of the owner* by the *bonâ fide* orders of the master given with the privity of the owner, but as on a contract with the owner on orders given by the master *as for him*. Now in this case, on the evidence, it appears that the defendant did not, by word or deed, in any way hold out the master *as his master*" (x). The Court also observed, that it did not think that the direction that the defendant was not conclusively entitled in point of law to a verdict, if the facts given in evidence on his behalf were believed, was correct, "for as there was only evidence of an actual authority, and no evidence of such a holding out of the master by the defendant as his agent as to preclude the defendant from denying the agency, the real question for the jury was, whether the master was in fact the defendant's agent; and if the defendant's evidence was believed, he was not."

In a later case (y) an action was brought against a person, who was alleged to be the owner of a ship, for damages claimed in respect of the non-conveyance of goods which the master of the ship had agreed to carry under a charter-party executed by him at Valparaiso. The facts appeared to be, that whilst the ship was at sea the registered owner had applied to the de-

(x) As to the proper inference to be drawn with respect to the master's agency where a British ship is sold whilst she is at sea or in a foreign port, see Cockburn, C. J., in *Robins v.*

Power, 4 C. B., N. S. 786.

(y) *Myers v. Willis*, 17 C. B. 77, affirmed Cam. Scacc., 18 C. B. 886. See also *Chapman v. Callis*, 9 C. B., N. S. 769.

defendant for an advance, and had executed to him an absolute bill of sale of the ship, which was afterwards registered by the defendant. The bill of sale, although in form absolute, was only intended as a collateral security to the defendant for the money advanced by him. Subsequently to the registration of the bill of sale the master entered into the charter-party under which the plaintiff claimed, both parties being ignorant of the then state of the ownership of the ship. The Court held, that the defendant was not liable; that it was not bound by the register, but might look at the real transaction between the parties; and that, looking at all the circumstances, it appeared that it was not intended that the defendant should become the real owner of the ship, but only that he should be interested in her to the extent of his advance; and that, therefore, it was manifest that he could not have intended to adopt the master as his agent and make himself liable for his acts. Upon the same principles it was held, that the mere fact of a person being registered as the part owner of the ship, under a bill of sale, which appeared to have been in fact given only as a security for advances, did not give to his co-owner authority to pledge his credit for necessary repairs (s). In another case (a) it appeared that repairs had been done, under the superintendence of the master, to a ship of which the defendant owned eight sixty-fourths, by the direction of the owner of the remaining sixty-fourths, who had always acted as the managing owner. Before the repairs were ordered the defendant had informed his co-owner that it was not his intention to sail the ship again, and had offered to sell his shares to his co-owner, to which the latter had assented, although the agreement had not ultimately been carried out. Shortly after the commencement of the repairs the defendant had given notice to the plaintiff that he would not pay for them. The Court held that the defendant was not liable, for that his co-owner had, under the circumstances, no authority to bind him, and there was nothing in the conduct of the defendant to justify the plaintiff in considering that he was one of the contracting parties. In another case (b), a ship sailed from England for a foreign port, the master having a power of attorney to act as agent for the then registered owner. Subsequently the de-

(s) *Hackwood v. Lyall*, 17 C. B. 124.
See also *The Innisfallen*, L. R., 1 A.
& E. 72.

(a) *Brodie v. Howard*, 17 C. B. 109;

and see the observations of Byles, J.,
in *Whitwell v. Perrin*, 4 C. B., N. S.
416.

(b) *Mackenzie v. Pooley*, 11 Ex. 638.

defendant purchased the vessel, was registered as owner, and afterwards resold the ship. An action was brought against the defendant for necessities supplied to the ship abroad on the order of the master, at a time when the defendant was the registered owner. It was held, that he was not liable, the master not appearing to have been at this time his agent in fact. But where the defendant was not only beneficially interested, but knew that another part owner was acting as the ship's husband, and had himself received a share of the profits, it was held, that there was evidence to go to the jury that the ship's husband had authority to contract for necessities on behalf of the owners; and the co-owners were held liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship, and on the bankruptcy of the latter the plaintiff had proved against their estate for the balance (c). In a recent case, a ship having been laid up in a public dock, the plaintiff was injured by the negligence of the ship keeper in charge of her. No evidence was given to show by whom the ship keeper was appointed, but the register was put in, and in this the defendant's name appeared as owner. It was held that this was *prima facie* evidence from which the jury might infer that the defendant had employed the person in charge (d).

We have already seen (e) that where a transfer is made only as a security for the payment of debts, the transferee does not become, nor does the transferor cease to be, owner, except so far as may be necessary to render his security available (f). Where mortgagees are not in possession, and have not personally interfered, their liability for necessities supplied to the ship depends upon whether a contract, either express or implied, was entered into on their behalf (g); for no mort-

Liability of
mortgagees.

(c) *Whitwell v. Perrin*, 4 C. B., N. S. 412.

(d) *Hibbs v. Ross*, L. R., 1 Q. B. 534.

(e) *Anto*, p. 58.

(f) The M. S. Act, 1854, s. 70. Under the 6 Geo. 4, c. 110, it was held, that a mortgagee was only an owner to the extent of the value mortgaged. *Irving v. Richardson*, 2 B. & Ad. 193. The M. S. Act, 1854, gave a form of mortgage which is different from the form which was in use before that act. (See Appendix, Forms, Nos. 11, 12.) The

statutory forms now in use do not, in terms, transfer the ship to the mortgagee. The mortgagor "mortgages" the shares in the ship of which he is owner to the mortgagee.

(g) 3 Kent's Com. 136. It is there said, "If there has been no dealing with the mortgagor, in the character of owner, but the credit has been given to the person who may be owner, it is a point still remaining open for discussion, whether the liability will attach to the beneficial or to the legal owner." It is only to solve the question in appearance

gagee is, merely as such, liable; and, therefore, where the original owner assigned by bill of sale all his interest, and afterwards sails and rigging were furnished on his account, and on his credit alone, it was held, that the assignee could not be charged with the price of these goods (*h*). And a mere mortgagee, who did not take possession, was held not to be liable for necessities supplied for the use of the ship previously to a re-transfer (*i*). Where a person, who was mortgagee as well as broker for the ship, gave directions for repairs, it was held that the question for the jury was, whether he acted only as broker, or as a person having an interest in the ship (*k*). And where a purchaser had entered on the register an absolute bill of sale, he was allowed to prove, in order to show that the repairs were not done on his credit, that by a defeasance, not mentioned on the register, he had only a qualified property (*l*). And a person who had executed a bill of sale as the owner of a share, was held not to be estopped from showing that his name was inserted in the register without his consent, and that he had executed the deed for the purpose only of divesting himself of any supposed title (*m*).

Liability of
owners *pro*
hde vice.

The liability of the owners for repairs when the ship has been let to third persons depends also upon whether the contract for repairs is, in fact, made with them, or with the lessee (*n*). Thus, a registered owner, who had chartered the ship to the captain for a certain number of voyages at a fixed rent, was held not to be

to say that in such a case the ordinary rule as to undiscovered principals would be applied, and that that party would be held liable for whom the master was then acting as agent: for in cases of change of ownership uncommunicated to the master there is often much practical difficulty in determining whose agent he was on any particular occasion.

(*h*) *Baker v. Buckle*, 7 Moore, 349. The case of *Dowson v. Leake*, 1 Dowl. & R. N. P., a note of which will also be found in *Holt on Shipping*, p. 198, *nomine Dowson v. Longster*, has some bearing on this point; but the question there was one of fact rather than of law.

(*i*) *Chinnery v. Blackburne*, 1 H. Bl. 117, note; *Twentyman v. Hart*, 1 Stark. 366; *Jackson v. Vernon*, 1 H. Bl. 114; *Annett v. Carstairs*, 3 Camp. 354.

(*k*) *Castle v. Duke*, 5 C. & P. 359.

The weight of the American decisions has been in favour of the position that a mortgagee out of possession is not liable for repairs or necessities procured on the order of the master, and not upon the particular credit of the mortgagee, who has not been in receipt of the freight; though the rule is otherwise where the mortgagee is in possession, and the vessel is employed on his service. 3 Kent's Com. 134, 135.

(*l*) *Cox v. Reid*, R. & Moo. 199.

(*m*) *Rands v. Thomas*, 5 M. & S. 244. This and some of the other cases cited above are decisions under the old Registry Acts, but the principles of them are applicable under the statutes now in force.

(*n*) See *The Great Eastern*, L. R., 2 A. & E. 88, where this question is fully discussed in the judgment of Sir R. Phillimore.

liable for stores furnished under the captain's orders during the existence of the charter-party; since, under the circumstances, the captain could not be considered to be his servant (*o*). So, on the other hand, where a ship was captured, and afterwards liberated, and abandoned to underwriters by the owners on notice of the capture, it was held, that they were still liable for stores and necessities ordered by the supercargo after the abandonment (*p*). And the owners of a Post Office packet were considered to be liable for stores ordered by the captain, although he was not appointed by them, but by the Postmaster General (*q*). We shall see, in subsequent Chapters (*r*), in what cases the charterers of ships are to be considered as owners *pro hac vice*, and how far their liability to third persons on contracts relating to the ship, or for injuries occasioned by her mismanagement, is affected by this consideration.

When once the liability is established, each owner is by the law of England, which differs in this respect from the civil law, liable *in solido* for the whole amount of the debt, without reference to the proportion of his interest, or to any stipulations between himself and the other owners (*s*). So, the owners cannot qualify their liability by any arrangement with their agents. Thus, where an owner agreed with his agent that the latter should pay for the repairs, on having the ship transferred to him, it was held that a creditor of the owner must look to him, and could not sue the agent (*t*). And if persons separately interested in aliquot parts of a ship employ a joint agent, they are, at law, liable each for the whole of the debt incurred (*u*). As between themselves, however, there exists a right of contribution or indemnity (*x*).

EXTENT OF
LIABILITY FOR
REPAIRS AND
NECESSARIES.

(*o*) *Frazer v. Marsh*, 2 Camp. 517; *S. C.* 13 East, 238; *Reeve v. Davis*, 1 A. & E. 312, and *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*p*) *Mitchell v. Glennie*, 1 Stark. 230.

(*q*) *Stokes v. Carne*, 2 Camp. 389.

(*r*) See *post*, Chapters VI. and IX., CONTRACT OF AFFREIGHTMENT and COLLISION.

(*s*) *Doddington v. Hallett*, 1 Ves. sen. 498; *Thompson v. Finden*, 4 C. & P. 158. The Scotch law is the same; 2 Bell's Com. 656; also the American. In France and Holland part owners are liable to the extent only of their shares. 3 Kent's Com. 155. The observations

in the text must now be read subject to the limitations imposed on the liability of members of corporations constituted under the Joint-Stock Companies Act, 1862, relating to companies with limited liability. (25 & 26 Vict. c. 89, s. 205. See also the repealed act, 19 & 20 Vict. c. 47.)

(*t*) *Rattenbury v. Fenton*, 3 Mylne & K. 505. See also *Stewart v. Hall*, 2 Dow, 29.

(*u*) *Passmore v. Bousfield*, 1 Stark. 296; Bac. Abr. tit. *Merchant*, D.

(*x*) *Speerman v. Degrave*, 2 Vern. 643; and see Lindley on Partnership, 4th ed. p. 768.

RIGHTS OF
MATERIAL MEN
TO DETAIN OR
PROCEED
AGAINST THE
SHIP.

By the civil law, and the law of those countries which have adopted its principles, a maritime lien upon the ship is given to those who repair her, or furnish her with necessaries, either at home or abroad (y). But, in England, the rule is different. The master may, in cases of necessity arising abroad, hypothecate the ship, and so, in effect, give a maritime lien on her: but, at home, no right to detain or arrest the ship for work done in respect of the ship can exist, except in those cases in which, by the general law, a right of this description is allowed, or in which a maritime lien or a right of proceeding against the ship resembling a maritime lien has been conferred by statute.

The general rule of the common law is, that every artificer has a particular lien on any chattel which has been delivered to him in his business, and on which he has expended his labour; and on this principle a shipwright has a lien for repairs, so long as he does not part with the possession of the ship (z). But a lien of this nature must not be confounded with a maritime lien; it is lost as soon as the possession is parted with: and where the work is done on credit, or there is any usage of trade inconsistent with the lien, it never arises (a).

It has been held that, in cases of bankruptcy, creditors who have repaired a ship have an equitable lien on her earnings, not from any doctrine peculiar to the earnings of a ship, but on the

(y) 3 Kent's Com. 168; Dig. 14, 1, 1; 1 Valin's Com. 363, 367. Proceedings to enforce a lien of this description in Courts of countries adopting this law must be considered as proceedings in rem. *Castrique v. Imrie*, L. R., 4 H. L. 414.

(z) *Hoare v. Clement*, 2 Show. 338; *Justin v. Ballam*, 1 Salk. 34; *Ex parte Bland*, 2 Rose, 91; *Franklin v. Hosier*, 4 B. & Ald. 341; *Buxton v. Snee*, 1 Ves. sen. 154; *Watkinson v. Bernadiston*, 2 P. Wms. 367. But the right of possessory lien confers no right of sale upon the person who has the lien. *Thames Iron Work Co. v. The Patent Derrick Co.*, 29 L. J., Ch. 714; but see Rules of the Supreme Court, Ord. LII. r. 2. A shipwright is not entitled to be paid for the use of his dock while he detains the ship under such lien against the will of the owner, unless there is some special contract, custom, or usage to authorize such claim. *British Empire Shipping Co. v. Somerset*, E. B. & E. 353; 30 L. J., Q. B. 229. The Scotch law is now similar. *Wood v. Creditors of Weir*, 1 Bell's Com. 527. So in America, 3

Kent's Com. 169. The security of material men has been the subject of legislative provision in several of the American states. In New York, shipwrights and material men have, by statute, a lien for the amount of their debts, whether the ship is owned within the state or not, but the lien ceases after due security given, or when the vessel leaves the state. *Ib.* 170. As to what constitutes a relinquishment of possession of a ship, see *Barr v. Shearer*, 2 Sess. Ca. (4th series), 14. As to priority of payment where a possessory lien comes into conflict with a maritime lien, see *The Gustaf*, Luah, 596.

(a) *Raitt v. Mitchell*, 4 Camp. 146. In the American Courts it has been held that giving credit for a fixed time is not inconsistent with a lien, for a lien may exist for a debt *solvendum in futuro*. 3 Kent's Com. 171, note (b). See as to the more extensive lien which is enforced by the Court of Admiralty in cases of collision and the like, *post*, Chap. IX.

general principle of equity, that the joint earnings of every partnership are liable to the joint creditors; but this right exists only in respect of earnings which have accrued during the time the ship remained the property of the owners to whom the credit was given, and does not extend to freight accruing subsequently to a sale (b).

Formerly the jurisdiction of the Court of Admiralty in suits relating to repairs and supplies was very doubtful; the Courts of common law holding that the Admiralty had no jurisdiction in such cases, and prior to the passing of the statutes about to be mentioned, material men, unless in possession, were not entitled to any preference over other creditors; and had no claim against the ship *in specie*, or against the proceeds of the ship when sold (c). The legislature has, however, of late conferred jurisdiction upon the Admiralty to entertain suits of this nature in certain cases.

JURISDICTION
OF ADMIRALTY
IN CASES OF
REPAIRS, &c.
TO SHIPS.

By the 3 & 4 Vict. c. 65, s. 6 (d), the Court of Admiralty was empowered to decide all claims and demands for necessities supplied to any foreign ship, or sea-going vessel, and to enforce payment thereof, whether she might have been within the body of a county or upon the high seas when they were furnished (e).

3 & 4 Vict.
c. 65.

This section relates exclusively to foreign vessels, and the object of the statute was to provide a remedy against the inconvenience which frequently occurred where a foreign vessel was driven upon the coasts of this country, and the master, having no credit, was under great difficulty in obtaining necessities for the purpose of refitting her, and of proceeding on the voyage (e). It was held that the Court had no jurisdiction under this act, where the articles were supplied by an English manufacturer to a foreign ship, building in a foreign port (f). A vessel built and registered at New Brunswick, and owned by a mercantile firm residing in Nova Scotia, has been held not to be a foreign sea-going vessel within this act (g). The juris-

(b) *Ex parte Hill*, 1 Madd. 61. See also *post*, p. 107, "Bankruptcy."

(c) *The Neptune*, 3 Knapp's P. C. Cases, 94; 3 Hagg. 136; *The Scio*, L. R., 1 A. & E. 353.

(d) See Appendix, p. ccxiii, n. (f).

(e) See the judgment of Dr. Lushington in *The Ocean*, 2 W. Rob. 368.

(f) See *The Ocean*, 2 W. Rob. 368, and *The India*, 32 L. J., P. M. & A. 185. It was held that the Court had jurisdiction in a suit, brought after the passing of the act, for necessities supplied before. *The Alexander*, 1 W. Rob. 288, 361.

(g) *The Ocean Queen*, 1 W. Rob. 457:

diction given by this statute was held to extend to the supply of necessaries by an English firm to a foreign ship at a port within an English colony (*h*). It has been held that this section confers a maritime lien (*i*).

X Admiralty
Court Act,
1861.

By the Admiralty Court Act, 1861, the Court of Admiralty has jurisdiction over the following matters:—

The fourth section confers jurisdiction over all claims for the building, equipping, or repairing of any ship, if, at the time of the institution of the cause, the ship or proceeds are under the arrest of the Court (*j*).

The fifth section confers jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which she belongs, unless it is shown to the satisfaction of the Court, that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales (*k*). The last-mentioned section provided that if in any cause instituted under that section the plaintiff did not recover 20%, he should not be entitled to any costs, unless the judge certified that the cause was a fit one to be tried in the Admiralty Court. But it seems that since the Judicature Act this provision is inoperative, and the costs are in the discretion of the Court (*l*).

Neither of these sections confers a maritime lien in the proper sense of the term. The right conferred is nothing more than a statutory right to proceed against the ship (*m*).

By sect. 8 of the 19 & 20 Vict. c. 97, every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the Queen's dominions, is, as to these matters, a home port.

(*h*) *The Wataga*, Swab. 165; *The Anna*, L. R., 1 P. D. 253. A vessel foreign at the time the necessaries are supplied cannot change her legal position by a subsequent sale, and she remains liable under this section. *The Princess Charlotte*, 33 L. J., P. M. & A. 188; see also *The Ella A. Clark*, Br. & L. 32.

(*i*) *The Ella A. Clark*, Br. & L. 32. See *The Two Ellens*, L. R., 3 A. & E.

345; 4 P. C. 161.

(*j*) The 24 Vict. c. 10, s. 4. The word "ship," as used in this act, includes every description of vessel used in navigation not propelled by oars. See sect. 2.

(*k*) To deprive the Court of jurisdiction this must be made to appear before judgment. *Ex parte Michael*, L. R., 7 Q. B. 658.

(*l*) See Rules of the Supreme Court, Order LV., and *Garnett v. Bradley*, 3 App. Cas. 944.

(*m*) *The Two Ellens*, L. R., 4 P. C. 161. See also *The Pacific*, Br. & L. 243; *The Troubadour*, L. R., 1 A. & E. 302, and *The Pieve Superiore*, L. R., 5 P. C. 482, *ante*, p. 86.

The County Courts in England having Admiralty jurisdiction may try claims for necessities, where the amount claimed does not exceed 150*l.*, or where consent is given by agreement (*n*). A limited jurisdiction has also been conferred on the Court of Admiralty in Ireland (*o*), and upon the Courts of the Recorders of Cork and Belfast (*p*).

Jurisdiction of County Courts and other Courts.

The Vice-Admiralty Courts in British possessions abroad have jurisdiction to entertain claims for necessities supplied, in the possession in which the Court is established, to any ship of which no owner or part-owner is domiciled within the possession at the time of the work being done (*q*).

The term "*necessaries*" is strictly applicable only to anchors, cables, rigging, and matters of this description; but it may also include money expended upon necessities. It includes all that is fit and proper for the service in which the ship is engaged, and that the owner, as a prudent man, would have ordered if present (*r*). Insurance of freight, charges of brokers for entering and reporting, pilotage and light dues are within the term (*s*); and the onus of proving that the articles supplied were, under the circumstances, necessities, lies, both in the Admiralty and in the Common Law Courts, upon the person who supplies them (*t*). Money expended in meat, &c. for the maintenance of the crew is within the term necessities (*u*). In all cases, satisfactory proof

What are necessities.

(*n*) The 31 & 31 Vict. c. 71 (the County Courts Admiralty Jurisdiction Act, 1868), s. 3. This jurisdiction is limited to cases over which the Admiralty Court had jurisdiction. *Allen v. Garbutt*, 6 Q. B. D. 165; *The Downs*, L. R., 3 A. & E. 135. See also *Gunned v. Price*, L. R., 10 Ex. 65, following *Simpson v. Blues*, L. R., 5 C. P. 134, and differing from the decision of the Privy Council in *The Cargo ex Argos*, L. R., 5 P. C. 134.

(*o*) The 30 & 31 Vict. c. 114, pt. iv. See also the County Offices (Ireland) Act (40 & 41 Vict. c. 56), s. 49, by which act power has been given to the Lord Lieutenant to confer jurisdiction in admiralty on other local courts in Ireland there mentioned.

(*p*) The 39 & 40 Vict. c. 28, s. 3.

(*q*) The 26 Vict. c. 24, s. 10, amended by 30 & 31 Vict. c. 45. In the recent case of *The Maude*, the Vice-Admiralty Court at Gibraltar has held that this section confers a maritime lien.

(*r*) *The Sophie*, 1 W. Rob. 368; *The Alexander*, 1 W. Rob. 294; *The Riga*,

L. R., 3 A. & E. 516. Coals and a screw propeller are necessities for a steamer. See *The West Friesland*, Swa. 454; *The Hecla*, 1 Spk. 441. In *The Comtesse de Frégoille*, Lush. 329, it was said that necessities meant articles immediately necessary for the ship, as contradistinguished from those merely necessary for the voyage. But see now *The Riga*, *ubi sup.*; *The Albert Crosby*, L. R., 3 A. & E. 37. The expenses of bringing witnesses to London, to assist the master in causes instituted against the ship in the Admiralty, are not necessities. *The Bonne Amélie*, L. R., 1 A. & E. 19. See also *Gunn v. Roberts*, L. R., 9 C. P. 331.

(*s*) *The Riga*, L. R., 3 A. & E. 516; *The St. Lawrence*, 5 P. D. 250. Money advanced to pay averages has been excluded. *The Aaltje Willemina*, L. R., 1 A. & E. 107.

(*t*) *The Alexander*, 1 W. Rob. 288, 361; *Carey v. White*, 1 Brown, P. C. 214; *Mackintosh v. Mitcheson*, 4 Ex. 175.

(*u*) *The Bonne Amélie*, L. R., 1 A. & E. 19.

must be given that the necessaries were wanting, or that the money was *bond fide* advanced for the purpose of procuring them (*x*). It was formerly held that a suit could not be sustained for money paid to discharge a debt incurred for necessaries (*y*); but in a recent case, where a firm in England had accepted and paid a bill of exchange, drawn on them by the master of a foreign ship abroad, to procure necessaries, it was held that they might sue the ship in the Admiralty Court for necessaries (*z*).

We have already seen that all ships are considered to be divided into sixty-four parts or shares, and it must now be observed that where the shares do not all belong to the same person, part ownership exists.

PART OWNERS. By sect. 37 of the Merchant Shipping Act, 1854, as amended by sect. 2 of the Merchant Shipping Act, 1880, the number of registered owners is limited to sixty-four, and no person is entitled to be registered as the owner of any fractional part of a share in a ship; but these rules are subject to the provisions of the former Act as to joint owners and owners by transmission, and do not affect the beneficial title of any number of persons, or of companies represented by or claiming under registered owners or joint owners; and bodies corporate may be registered by their corporate name (*a*). The 37th section of the Merchant Shipping Act, 1854, also provides that any number of persons not exceeding five may be registered as joint owners of a ship, or of a share or share therein, and that such joint owners shall be considered as only one person, so far as relates to the rule which has been mentioned as to the number of registered owners, and shall not be entitled to dispose in severalty of their interest in the ship.

Rights and liabilities inter se. Part owners are not necessarily partners; they are tenants in common when, as is almost always the case, they take their interests at different times and by separate purchases (*b*).
Part owners not partners.

(*x*) *The Sophie*, 1 W. Rob. 368; *The Alexander*, *ubi sup.*

(*y*) *The N. R. Gosfabrick*, Swa. 344.

(*z*) *The Onni*, Lush. 154. See also *The Albert Crosby*, L. R., 3 A. & E. 37; *The Anna*, 1 P. D. 253; *The St. Laurence*, 5 P. D. 250.

(*a*) 43 & 44 Vict. c. 18, s. 2 (Appendix, p. cccclxxx). It is important to bear in mind that, by s. 100 of this act, all persons who are beneficially interested in a ship (otherwise than by way of

mortgage), but whose names are not on the register, are made liable to all pecuniary penalties imposed by this or any other act on the owners of ships.

(*b*) *Green v. Briggs*, 6 Hare, 395; *Owston v. Ogle*, 13 East, 538; *Helme v. Smith*, 7 Bing. 709; *Brodie v. Howard*, 17 C. B. 109; Collyer on Partnership, b. 5, c. 4; *Smith's Merc. Law*, p. 191, (8th edit.); *Lindley on Partnership*, vol. 1, 4th ed. p. 61.

The meaning of this rule is, that the relation of partnership does not arise between them from the mere fact of their holding shares in the same ship; they *may*, however, be actually in partnership (*c*), or there may be a partnership in the adventure, and not in the ship (*d*). In partnership, properly so called, no one can become the partner of another without his consent: but a person may become part owner of a ship without the consent of the other owners, as by purchase, succession and the like (*e*). There appears to be nothing to render impossible the creation of an ordinary joint tenancy in the shares of a ship (*f*), but even should this relation exist between the part owners, it is a rule both of the law merchant and of equity, that there is no survivorship between them, for *jus accrescendi* *Jus accrescendi.*
inter mercatores, pro beneficio commercii locum non habet (*g*). When it is said that this is a rule of law, it is meant that if a joint tenancy existed in a ship, there would be no survivorship of the legal title to the shares, but it must not be supposed that rights of action are affected by this rule. The right of action on any joint contract with merchants, or for any injury to the joint property, survives, and the executor of the deceased could not be joined in the suit (*h*). The earnings of a ship follow the general law of partnership (*i*).

Subject to these observations, the ordinary rules respecting tenants in common apply to part owners. Thus one part owner could not, according to the principles administered in the Com- Remedies as against each other.

(*c*) See the judgment in *Helme v. Smith, ubi sup.* Where part owners work the ship together for profit they are in the same position as partners. *Jobson v. East and West India Dock Company*, L. R., 10 C. P. 300.

(*d*) *Holderness v. Shackells*, 8 B. & C. 612. It was once held that part owners, although tenants in common and not joint tenants, had a right to consider the ship as partnership effects, and as liable to pay all debts which any of them might have incurred on her account, so as to give to those partners who were compelled to pay, a lien in equity on the share of others who had not contributed. *Doddington v. Hallett*, 1 Ves. sen. 497. But this decision has since been overruled. *Ex parte Young*, 2 Rose, 78, note; 2 Ves. & B. 242; and see *Green v. Briggs*, 6 Hare, 395.

(*e*) *Holt on Ship.*, Introduction, 32.

(*f*) See *Abbott on Ship.* 78; *Smith's Merc. Law*, p. 189 (8th edit.).

(*g*) See the authorities cited in the last note, and *Co. Litt.* 182 a; *Buckley v. Barber*, 6 Ex. 164.

(*h*) This is an anomaly; see the judgment of *Dampier, J.*, in *Re v. Collector of Customs*, 2 M. & S. 225; *Martin v. Crompe*, 1 Ld. Raym. 340; *Buckley v. Barber*, 6 Ex. 164. In the earlier cases this rule was not distinctly recognized; actions were brought jointly by the survivor and the executor, and the non-joinder of the executor was in some instances pleaded in abatement. See *Hall v. Huffam*, 2 Lev. 188, 228; 3 Keb. 737, 798; *Kemp v. Andrews*, 3 Lev. 290; *Smyth v. Milward*, 2 Lutw. 1493.

(*i*) *Green v. Briggs*, 6 Hare, 395; *Gardner v. McCutcheon*, 4 Beav. 534.

mon Law Courts, bring trover for the value of his share against another, unless there has been an actual destruction of the ship, or some act equivalent to it (*k*). The mere sale of the ship by one of them, it appears, was not equivalent to a destruction, for, generally, such a sale would only pass the interest of the seller; although it would be otherwise if the whole property passed (*l*). Where it appeared that the plaintiff was tenant in common of one moiety, and the defendants of the other, and that they forcibly took the ship out of his possession, changed her name, and secreted her from him, and that she, after getting into the hands of a third person who sent her on a foreign voyage, was totally lost, it was left to the jury to consider whether the destruction was not by means of the defendants' acts; and the jury having found that it was, the Court held that the direction was proper, and refused to disturb the verdict (*m*). But where one part owner sued the other for fraudulently and deceitfully carrying the ship beyond the seas without his assent, whereby he lost his share, the Court arrested the judgment, and held, that owing to the trust and confidence which the law supposes to exist between tenants in common, there cannot be any fraud between them, and that, under such circumstances, they had no remedy at law (*n*).

It has been held, that where one part owner objects to the employment of the ship on a particular voyage, but does not expressly dissent, he is liable in equity, if the ship is afterwards lost, for his proportion of the loss (*o*), but that it is otherwise if he expressly dissents (*p*).

Admiralty jurisdiction as to employment of ship, and as to disputes between owners.

In consequence of the difficulty of obtaining complete relief in the Courts of Common Law in cases of disputes between part owners as to the employment of the ship, the Court of Admiralty from early times has exercised a peculiar jurisdiction in such cases (*q*). In the words of Lord Tenterden "it has been the

(*k*) See Litt. s. 323; *Heath v. Hubbard*, 4 East, 110; *Mayhew v. Herrick*, 7 C. B. 229.

(*l*) *Heath v. Hubbard*, *ubi sup.*, 2 Wms. Saund. 47 p. note (*c*); *Barton v. Williams*, 5 B. & A. 395; and see the observation of Parke, B., in *Farrar v. Beawick*, 1 M. & W. 688; and *Ex parte Howden*, 2 Mont. D. & D. 574.

(*m*) *Bernadiston v. Chayman*, C. B.,

1 Geo. 1, before King, C. J., cited 4 East, 121.

(*n*) *Graves v. Sawyer*, 1 Lev. 29; *S. C.*, Sir T. Raym. 15. It does not appear distinctly whether the ship was lost; see also *Molloy*, B. 2, c. 1, s. 2.

(*o*) *Shelley v. Winson*, 1 Vern. 297.

(*p*) *Horn v. Gilpin*, Ambler, 255.

(*q*) *Molloy*, B. 2, c. 1, s. 2; *Beawes*, 107.

constant practice, in disputes between part owners as to the employment of the vessel, where the majority in value of the shareholders are desirous to send the vessel on a voyage to which the minority will not consent, for the Court of Admiralty to arrest the ship at the instance of the latter, and to take from the majority a stipulation in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. Although the jurisdiction of the Admiralty in such cases was once doubted, there are several authorities recognizing it; and it may now be taken as settled, that in disputes between part owners as to the employment of a ship, the Court of Admiralty may, by warrant, arrest and detain the ship until security be given to the amount of the value of the shares of those part owners who dissent from the particular employment" (r). If the minority have possession of the ship, and refuse to employ her, the majority may, on a similar warrant, obtain possession and send her to sea, on giving the like security (s). A dissenting owner is not entitled to any share of the freight earned on the voyage (t). Where, however, he arrests the ship after the other owners have expended money in repairing it and fitting it out, he is bound to pay his proportion of these expenses (u). But the inherent jurisdiction of the Court of Admiralty was so limited that until recently it was unable to decide questions of title (x). Further, it had no power to enter-

Adjustment
of accounts.

(r) *In re Blanchard*, 2 B. & C. 248, and see *The Apollo*, 1 Hagg. 306. The Court has jurisdiction to take a vessel from a mere wrongdoer, and deliver it to the lawful owner. *Ib.*

(s) According to the present practice the condition of the bail bond is to answer judgment in the action. Where a bond was given for the safe return of a ship to a particular port of this kingdom, and the ship having been carried by distress into another port was there arrested in suits for salvage and wages, the Court of Admiralty declined to pronounce the bond forfeited, and held, that while the ship was within the jurisdiction of the Court, safe and unsold, the application was premature. It appears that, according to the American law, the minority may employ the ship in like manner, if the majority decline to employ her at all. *Steamboat Orleans*

v. Phœbus, 11 Peter's (American) Rep. 176; *The Margaret*, 2 Hagg. 276.

(t) *Anon.*, 2 Chanc. Cas. 36; *Boson v. Sandford*, Carth. 63.

(u) *Davis v. Johnston*, 4 Sim. 539.

(x) Where the shares were not ascertained, the Court had no jurisdiction of this description, and in such a case the Court of Chancery would restrain the sailing of the ship by injunction until the share of the party complaining was ascertained, and security given to the amount of it. *Haly v. Goodson*, 2 Mer. 77; *Christie v. Craig*, *Ib.* 137. See, however, *Castelli v. Cook*, 7 Hare, 89. As to the jurisdiction of the Court of Chancery where there is an express agreement as to the employment of the ship, see *Darby v. Baines*, 9 Hare, 369. See, also, *Brenan v. Preston*, 2 De G., M. & G. 813; *Hart v. Herwig*, L. R., 8 Ch. App. 861.

tain questions of account (*t*), and the only process by which part owners could compel an adjustment of the ship's accounts amongst themselves was, until recently, a suit in equity (*u*).

Admiralty
Court Act,
1861, s. 8.

The jurisdiction of the Court of Admiralty was, however, extended by the 8th section of the Admiralty Court Act, 1861 (*x*), which conferred upon the Court jurisdiction to decide all questions arising between co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port of England or Wales, and to settle all accounts outstanding and unsettled between them, and to direct the ship or any share to be sold, or to make such order as to it shall seem fit. The Admiralty Division, therefore, now possesses full power to settle all disputes between co-owners, and although the Court is always reluctant to order the sale of a ship without the consent of the owners representing the majority in interest, yet where it is obviously for the advantage of the owners as a body that the ship should be sold the Court will decree a sale at the suit of the minority (*y*).

Contribution
towards ex-
penses.

Each owner is also bound, before the commencement of the voyage, to contribute his share of capital for the expenses of the outfit, and, therefore, if one part owner, who is ship's husband, incurs this expense, he may sue the others separately for their share of it (*z*).

One of several part owners has a right to require that the

(*t*) A copartner could not (before the Admiralty Court Act, 1861) originate a suit for accounts in the Admiralty Court. *The Apollo*, 1 Hagg. 306.

(*u*) Collyer on Partnership, 683. Where one of the part owners, who acted as ship's husband, covenanted with the others to make out the ship's accounts, and divide the profits after the ship's return, it was held, that the other owners might sue him at law on this covenant. *Ouston v. Ogle*, 13 East, 538; see also *Vanner v. Frost*, 39 L. J., Ch. 626. To a bill filed for an account of the profits of the ship all the part owners were necessary parties. *Moffat v. Farquharson*, 2 Brown, C. C. 338; Collyer on Part. 683.

(*x*) The 24 Vict. c. 10, s. 8; *The City of Mobile*, L. R., 4 A. & E. 191. This section gives the Court power to order accounts between co-owners before the date assigned for the act to come into operation; also as to matters relating

to a ship lost before the institution of the cause. *The Idas*, Br. & L. 65. And it can order accounts to be taken between co-owners where one co-owner has ceased to be so at the institution of the suit. *The Lady of the Lake*, L. R., 3 A. & E. 29.

(*y*) *The Nelly Schneider*, 3 P. D. 152. See the judgment of Sir C. Robinson, in *The Margaret*, 2 Hagg. 276; *Ouston v. Hobden*, 1 Wils. 101. The Scotch and American Courts have exercised the right of compelling a sale, at least where the part owners were equally divided in opinion; 1 Bell's Comm. 503; 3 Kent's Comm. 153, 154. The Court will in its discretion exercise this jurisdiction in the case of a dispute between the owners of a foreign ship. *The Evangelistria*, 2 P. D. 241; *The Agincourt*, *ibid.* 239.

(*z*) *Helme v. Smith*, 7 Bing. 709; *Vanner v. Frost*, 39 L. J., Chanc. 626.

gross freight or proceeds of the cargo shall be applied in the first place to the payment of the expense of the outfit of the ship for the voyage on which the freight was earned; and the same rule applies to the expenses of repairs to the hull, done with a view to the particular adventure in which the earnings were made, and without which the adventure would not have been undertaken (a). By sect. 515 of the Merchant Shipping Act, 1854, all money paid on account of any loss or damage in respect whereof the liability of the owners is limited by Part IX. of the act, and all costs incurred in relation thereto, may be brought into account among part owners of the same ship, in the same manner as money disbursed for the use thereof.

Part owners may, by the law of England, separate at any time by parting with their shares. The rule of the maritime law was different (b).

Part owners are usually liable for necessary repairs and stores ordered by one of themselves (c). But, strictly speaking, the simple existence of co-ownership does not give power to one part owner to pledge the credit of the others; for it is clear that, in all cases in which it is sought to make one part owner liable upon the order of another, the real circumstances and position of the parties must be looked to in order to ascertain whether any agency exists in point of fact. In a recent case, one of two part owners had not done any act to induce the creditor to suppose that the other had power to pledge his credit, and had given notice to his co-owner of his intention not to sail the ship again, and had offered to sell his share in her; it was held that, under these circumstances, he was not liable for repairs subsequently ordered by his co-owner, although the notice of his intention to sell had not been communicated to the creditor (d). The principle and limit of this liability, where it exists, is that it is reasonable to suppose that a part owner on the spot is allowed by the absent part owners to order whatever is necessary for the preservation, navigation and proper em-

Power to bind each other.

(a) *Green v. Briggs*, 6 Hare, 395; *Alexander v. Simms*, 5 De G., M. & G. 57. Wages, and the expense of manning the ship, are proper deductions to be made from the gross freight as between part owners of a ship and the assignee of the freight of another part owner. *Lindsay v. Gibbs*, 22 Beav. 522.

(b) *Molloy*, B. 2, c. 1, s. 3.

(c) See *Ex parte Bland*, 2 Rose, 92; Story on Agency, s. 40, and the cases as to repairs cited in the earlier part of this chapter.

(d) *Brodie v. Howard*, 17 C. B. 109. See also as to the circumstances from which such an authority is implied. *Preston v. Tamplin*, 2 H. & N. 363. Affirmed in error, *ib.* 684.

ployment of the ship, since the common owners of a valuable chattel must be presumed to intend its preservation and profitable employment (*e*). They cannot, however, bind each other as partners, unless an actual partnership exist, and then the ordinary rules relating to partnerships apply. Thus, one part owner has no authority to order insurances to be effected on behalf of the others, unless there is a partnership between them (*f*). If, however, the others subsequently adopt the insurance, they are bound by it (*g*): but, in the absence of any original authority, or subsequent ratification, the broker who effects the insurance can only look to the part owner who employs him, and is liable, on the other hand, to him alone, for the amount received from the underwriters (*h*).

Ship's husband.

Where, as is usual, one part owner is appointed ship's husband, he becomes the agent of the others in the management of the ship, and commonly receives some remuneration from his co-owners (*i*). It is then his duty to see to her proper outfit and equipment, and he has power to bind the others by contracts made within the scope of his agency. He has authority to procure a charter-party and to enter into contracts for the benefit of the owners of the ship; but he has no implied authority to cancel a charter-party (*k*). He cannot, as ship's husband, without express authority bind his co-owners for the expenses of extraordinary and unusual alterations (*l*), nor can he insure the shares of the other part owners, or bind them to the expenses of a

(*e*) See Holt on Ship., Introd. 33.

(*f*) *Hooper v. Lusby*, 4 Camp. 66.

(*g*) *Robinson v. Gleadow*, 2 Bing. N. C. 156.

(*h*) *Roberts v. Ogilby*, 9 Price, 269; and see *Hatsall v. Griffith*, 2 C. & M. 679.

(*i*) See *Salter v. Adey*, 1 Jur., N. S. 930, where it was held, that a part owner who entered on the duties of ship's husband without any express agreement for remuneration, but with a knowledge that his predecessor had received a commission, was, on an account being taken with his co-owners, entitled to the same commission as his predecessor. See also *Coulthurst v. Sweet*, L. R., 1 C. P. 649; *Holden v. Webber*, 29 Beav. 117; *Miller v. Mackay*, 31 Beav. 77. It has been decided that a director of a shipping company who was appointed to manage, in conjunction with a board of directors,

the affairs of the company for a stipulated remuneration, could not by appointing himself, even with the consent of the board, to the office of ship's husband, and, acting as such, entitle himself to receive sums for commission and brokerage as ship's husband. *Benson v. Heathorn*, 1 Y. & C. C. C. 340. In *Vanner v. Frost*, 39 L. J., Ch. 626, it was held that joint owners, acting as managers on behalf of the owners generally, furnishing supplies for the voyage, were entitled to sue for an account.

(*k*) *Thomas v. Lewis*, 4 Ex. D. 18.

(*l*) *Steele & Co. v. Dixon*, 3 Sess. Ca., 4th Series, 1003. See *Keay v. Fenwick*, 1 C. P. D. 745, where under special circumstances it was held that a sale of a ship by the managing owner had been ratified by the owners, and that the managing owner was entitled to a commission on the purchase-money.

law suit (*m*), or, as against other part owners, make an assignment of the whole freight, to secure money advanced to him (*n*). He is only entitled to charge the cost price of supplies to the ship, furnished by him in the course of his business (*o*). In a recent case it was held that a managing owner was entitled in virtue of his general authority to pledge the credit of his co-owner by giving a bond for the release of the ship which had been arrested in the Admiralty Court for a collision at sea (*p*). The fact that a part owner has acted as ship's husband is sufficient evidence of his appointment, without any formal proof; and although a part owner is entitled to refuse to expend money on the repairs of the ship, and to inform the other owners that if they order repairs it will be on their own responsibility, he cannot revoke an authority to make alterations after it has been acted on, and must give distinct evidence of his dissent, in order to avoid a liability for repairs and alterations ordered by the ship's husband (*q*). A ship's husband has a right to repay himself money advanced by him on account of the ship out of freight coming to his hands, but this right is in the nature of a right of lien or retainer, and does not constitute a charge upon freight (*r*).

The statutory provisions with respect to the registered managing owner have already been noticed in connection with registry (*s*).

Where one part owner becomes bankrupt his share passes to the assignees under the bankruptcy without being liable specifically to the claims of the other part owners in respect of their disbursements and liabilities for the ship (*t*); but it is a general rule, that the trustee of a bankrupt partner can obtain no share of the partnership effects until he has satisfied all that is due from the bankrupt to the partnership. Where oil, the produce of a joint adventure, was deposited in a warehouse, separated into shares, put into casks marked with the initials of the several owners, and, by the agreement between them, no partner

Bankruptcy.

(*m*) *French v. Backhouse*, 5 B. & C. 727;
Bell v. Humphries, 5 Stark. 345; *Camp-*
bell v. Stein, 6 Dow. 135.

(*n*) *Guion v. Trask*, 1 De G., F. & J.
373.

(*o*) *Ritchie v. Couper*, 28 Beav. 344.

(*p*) *Barker v. Highley*, 15 C. B., N. S.
27.

(*q*) *Chappell v. Bray*, 6 H. & N. 145.

(*r*) *Beynon v. Godden*, 3 Ex. Div. 263.
See *Bristow v. Whitmore*, 31 L. J., Ch.
467.

(*s*) *Ante*, p. 21.

(*t*) *Ex parte Harrison*, 2 Rose, 76;
Story, Eq. Jur. 1242.

had a right to his part until he had paid his share of the expense of procuring it, and one of them became bankrupt before his share was actually removed, it was held that the other part owners had a lien on it for the bankrupt owner's proportion of the disbursements of the ship, and were not bound to give it up to his assignees until this was paid (*x*). Where the managing owner received the freight warrants and paid them into a bank in his own name, drawing cheques from time to time, for various sums, out of the proceeds, part of which he applied for the use of the ship, and part for other purposes: it was held that the other part owners had no lien on this fund in the hands of the banker, nor any claim against him as their debtor (*y*).

Admission of one part owner not binding on the others.

Formerly questions arose as to whether part owners could give evidence for each other (*z*); but as objections on the ground of interest are now removed, and the parties to a suit are competent witnesses in their own case (*a*), it is unnecessary to notice these decisions; it must, however, be recollected, that the admission of one part owner is still not binding on the others (*b*).

Jurisdiction of Chancery and Admiralty to restrain the sailing of a ship.

The Court of Chancery possesses a general power to restrain the sailing of a ship in cases where the exercise of such a power is necessary to prevent justice being defeated, and it seems that the Admiralty Division may now exercise the same power (*c*).

Power of Courts of Chancery and Admiralty to sell interest of unqualified owners.

The Courts of Chancery and of Admiralty have, as we have already noticed (*d*), by statute, power to order a sale of any property in a ship or share which becomes vested, by transmission on the death of any owner, or the marriage of any female owner, in any person not qualified to be the owner of a British ship. The application must be made on behalf of the unqualified person, and the Court may deal with it, and with the proceeds of the sale as it thinks just (*e*). The order for sale must vest the right to transfer

(*x*) *Holderness v. Shackells*, 8 B. & C. 612; *Green v. Briggs*, 6 Hare, 395; see also *Boyd v. Mangles*, 3 Ex. 387.

(*y*) *Ex parte Gribble*, 3 Deac. & Chit. 339; and see *Sims v. Bond*, 5 B. & Ad. 389. As to the transmission of shares in a ship by bankruptcy, see the M. S. Act, 1854, ss. 58—60. Mortgages of ships, when duly registered, are exempt from the operation of the reputed ownership clauses in the bankrupt acts, sect. 72. See also the 32 & 33 Vict. c. 71, s. 16, and the repealed act 12 & 13 Vict. c. 106, s. 125, and *ante*, p. 59.

(*z*) *Atkinson v. Foster*, 1 C. B. 712.

(*a*) The 6 & 7 Vict. c. 85; the 14 & 15 Vict. c. 99, and the 16 & 17 Vict. c. 83.

(*b*) *Jaggers v. Binnings*, 1 Stark. 64.

(*c*) *Hart v. Herwig*, L. R., 8 Ch. 860; *The Horlock*, 2 F. D. 243; *Miles v. Thomas*, 9 Sim. 606; Rules of the Supreme Court, Ord. LII. r. 3.

(*d*) *Ante*, p. 47.

(*e*) The M. S. Act, 1854, s. 62; the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 12.

the property in a nominee of the Court, who may then transfer like a registered owner (*f*). The application for a sale must be made within four weeks after the occurrence of the event on which the transmission of the property has taken place, or within such further time (not exceeding one year from the date of such occurrence) as the Court may allow. If no application for a sale is made, or granted, the share or ship transmitted under the circumstances mentioned above becomes forfeited (*g*). These powers may be exercised in Ireland by the Court of Chancery, in Scotland by the Court of Session, and in any British possession, by the Court possessing the principal civil jurisdiction therein (*h*). The Court of Chancery, and the other Courts referred to above, have also, by the same statute, power conferred upon them to prohibit the dealing with any such ship or share for any time to be mentioned in an order made by the Court. Any person interested in the ship may apply for such an order (*i*).

In actions by and against part owners, the ordinary rules as to the joinder of parties apply. Formerly, questions of nonjoinder and misjoinder depended upon pleading rules of great nicety (*k*); the whole matter is now governed by the Judicature Acts and the Rules of the Supreme Court. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, and all persons against whom such right is alleged, may be joined as defendants, and judgment may be given according to the real rights of the parties (*l*). Where there are numerous parties to an action, one or more may be authorized by the Court to sue or defend in the name of the others, and in practice it is usual for one owner to sue on behalf of himself and the other owners (*m*). Parties to actions.

(*f*) The M. S. Act, 1854, s. 63.

(*g*) *Ib.* s. 64.

(*h*) *Ib.* s. 62.

(*i*) *Ib.* s. 65. These powers are extended to the Court of Admiralty by the Admiralty Court Act, 1861 (24 Vict. c. 10, s. 12), and to the Probate Court by s. 16 of the Judicature Act. *Nicholas v. Dracachis*, 1 F. D. 72.

(*k*) See as to non-joinder or misjoinder and pleas in abatement, the notes to *Cabell v. Vaughan*, 1 Wms. Saund. 29; *Addison v. Overend*, 6 T.

R. 766; *Phillips v. Claggett*, 10 M. & W. 102; and the practice under the Common Law Procedure Act (15 & 16 Vict. c. 76), ss. 3, 19, 34, 39, 41. *Bellingham v. Clark*, 1 B. & S. 332.

(*l*) Rules of the Supreme Court, Order XVI.

(*m*) Rules of the Supreme Court, Order XVI. rule 9, and by rule 10 of the same order partners may sue and be sued in the name of their firm. See also *De Hart v. Stevenson*, 1 Q. B. D. 313.

No plea or defence may now be pleaded in abatement (*n*), and no action may be defeated by the misjoinder of parties. The Court may at any time strike out or add parties, so as to enable it to completely adjudicate upon and settle all the questions involved in the action (*o*).

We have seen that, although there is no survivorship as to the right to the shares in a ship, the remedy in respect of any contract made with all the owners, or for any damage done during their lifetime to the ship, belongs to the survivors only (*p*).

(*n*) Rules of the Supreme Court,
Order XIX. rule 13.
(*o*) *Ib.* Order XVI. rule 13.

(*p*) See the cases cited *ante*, p. 101,
note (*h*); *Buckley v. Barber*, 6 Ex. 164.

CHAPTER III.

MASTER.

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THE master, more commonly called the captain, is the person appointed by the owner or owners, to command, navigate and manage the ship (a); and the law regards him as an officer who must render account for the whole charge committed to his care. By reason of his possession of the ship he may bring an action against a wrong-doer who seizes the ship, and may sue for freight earned under a contract to which he is a party (b). But where by a charter-party made by the master, the charterer agreed to pay freight generally, without saying to whom, it

(a) Molloy, B. 2, c. 2, s. 1; 3 Kent's Com. 160; the Consolato, c. 16. A full account of his office and duty under the French law will be found in the Encyclopédie du Droit, tit. Capitaine de Navire, and in the Dictionnaire Universel de Droit Maritime Caumont (Paris, 1867), tit. Capitaine, pp. 456—469. See also Code de Commerce,

Art. 221—249. By the M. S. Act, 1854, s. 2, the term "master" includes every person (except a pilot) having command or charge of any ship.

(b) *Pitts v. Gaines*, 1 Ld. Raym. 558; *Shields v. Davis*, 6 Taunt. 65. He may allege in pleading that the goods were carried in his ship. *Id.*

was held that the owner having received the freight, the master could not maintain an action for it against the charterer, although he had given him notice not to pay it to any one but himself (*b*). He may sue the consignor for the breach of any contract contained in the bill of lading (*c*); but, in the absence of an express contract, he cannot sue for the breach of an implied promise to discharge the ship within a reasonable time (*d*).

As the master possesses an almost absolute control over the crew and passengers, and is entrusted with very extensive powers and duties as regards the interests of the owners, and of the freighters and the care of the ship and cargo, and as he is liable, at any time, to be called upon to exercise agencies of a complex character, it is necessary that he should be a person capable of performing these numerous and important duties with skill, energy and good faith.

We will consider:—1, *the qualifications of the master*; 2, *his appointment and remuneration*; 3, *his authority over the crew and others on board*; 4, *his duties*; and 5, *his personal liability, and that of the owners, and of the freighters, arising out of his acts*.

QUALIFICATIONS.

First, as to *his qualifications*. Until 1854 it was in all cases necessary that the master of a British registered ship, wherever she was, should be a British subject (*e*). This, however, is no longer so (*f*). In most of the countries of maritime Europe there have long existed some legislative requirements as to the fitness and capacity of masters (*g*); in England, however, there were, until lately, no provisions on this subject, and owners, like others who are compelled to employ agents, were left to their own discretion to engage persons on whose skill and fidelity they could rely.

Examination. A system of examination was however established in 1850

(*b*) *Atkinson v. Cotesworth*, 3 B. & C. 647.

(*c*) *Cawthron v. Trickett*, 15 C. B., N. S. 754.

(*d*) *Brouncker v. Scott*, 4 Taunt. 1; *Jesson v. Solly*, *ib.* 52; *Evans v. Forster*, 1 B. & Ad. 118; *Stindt v. Roberts*, 5 D. & L. 460.

(*e*) See 12 & 13 Vict. c. 29, now repealed.

(*f*) By the M. S. Act, 1854, s. 44, the master's name must be inserted

in the certificate of registry; and, by sect. 46, a change of master must be indorsed on the certificate, and the officers of Customs, at any port under British dominion, may refuse to allow any person to act as master at such port, unless his name is in or on the certificate (see *supra*, pp. 20, 21).

(*g*) See French Ordonn., 7th August, 1826; *Encyclopédie du Droit*, tit. Capitaine de Navire; 3 Kent, Comm. 160, note (*a*).

by the Mercantile Marine Act, 13 & 14 Vict. c. 93, (which act is now repealed,) under which certificates might be granted by the Board of Trade, upon reports from the local boards.

The Merchant Shipping Acts, 1854 and 1862, contain the chief provisions which now regulate these examinations; under the former act Local Marine Boards are constituted at certain ports (*g*), consisting of certain local officers, with four persons appointed by the Board of Trade, and six who are elected by shipowners (*h*). These boards are bound to provide for the examination of masters and mates of "foreign-going ships" and of "home trade passenger ships" (*i*). The examination is under the control of the Board of Trade (*j*); it extends to the competency of the applicants; who must produce satisfactory testimonials of character and of their sobriety, experience, ability and good conduct on board ship; and when it has been passed, the Board of Trade (except where there is reason to suppose that the report of the local board has been unduly made, when the Board may remit the case to the same or other examiners) grants to the applicants a "certificate of competency;" either as master, first, second or only mate of a foreign-going ship, or as master or mate of a home trade passenger ship, as the case may be (*k*).

Certificates of competency and service.

By the Merchant Shipping Act, 1862, provision is made for the examination of masters and mates at ports where there are no Local Marine Boards. It is provided that the Board of Trade may, if satisfied that serious inconvenience exists at any

(*g*) These are (Jan. 1879):—Bristol, Hull, Liverpool, London, Newcastle, Plymouth, North Shields, South Shields, Sunderland, Aberdeen, Dundee, Glasgow, Greenock, Leith, Belfast, Cork, Dublin.

(*h*) The M. S. Act, 1854, ss. 110—121. See *post*, Chap. IV. *Crew*, where these provisions are more fully considered.

(*i*) The M. S. Act, 1854, s. 131. The term "foreign going ship" includes every ship employed in trading, or going between some place or places in the United Kingdom, and some place or places situate beyond the following limits, that is to say, the coasts of the United Kingdom, the Islands of Guernsey, Jersey, Sark, Alderney and Man, and the continent of Europe be-

tween the river Elbe and Brest inclusive. A "home trade passenger ship" means every home trade ship (that is, every ship employed in trading or going within the above-mentioned limits) employed in carrying passengers. See sect. 2. Voluntary examinations have lately been instituted for masters who command their own yachts.

(*j*) The M. S. Act, 1854, s. 132. As to fees, see s. 133, and Schedule, Table R.; and see Appendix, "Forms," No. 23, and No. 55, note (*a*).

(*k*) The M. S. Act, 1854, s. 134. A statement as to the qualifications required in masters and mates of foreign going and home trade ships has been issued by the Board of Trade, and printed by the Queen's printers.

port in consequence of the distance which applicants for certificates have to travel in order to be examined, send the examiners or examiners of any Local Marine Board to the port where this inconvenience exists; and the examination may thereupon be carried on at that port, in the presence of any persons appointed by the Board of Trade, and in the same manner as any other examination under the act (*l*). And by the Merchant Shipping Act, 1873, sect. 10, in any case where the business of a mercantile marine office (*m*) is conducted otherwise than under a Local Marine Board, the Board of Trade may establish a mercantile marine office, and procure the requisite buildings, and appoint superintendents, deputies, clerks and servants. They may also make all provisions and exercise all powers with respect to the holding of examinations for the purpose of granting certificates of competency as masters, mates, or engineers, to persons desirous of obtaining the same, as might have been made or exercised by a Local Marine Board.

The Merchant Shipping Act, 1862, provides that steam-ships, which are required to have on board certificated masters, shall also carry certificated engineers; and this statute provides for the examination of such engineers and the granting of certificates to them (*n*).

Under these statutes the Board of Trade has issued regulations with reference to the examination of masters and mates, and engineers; and masters and mates who are entitled to, or who hold certificates of competency, may, if they choose, undergo a voluntary examination as to their practical knowledge of the use and working of the steam-engine, and obtain an endorsement on their certificates that they have "passed in steam."

The Merchant Shipping (Colonial) Act, 1869, by sect. 8, enables the Queen to give effect to certificates granted by British colonial authorities where the Board of Trade reports that they are granted on such principles, and show the like qualification and competency as those granted in this country (*o*).

Other certificates, called "certificates of service," may also be granted under the statute, without examination, to persons

(*l*) The M. S. Act, 1862, s. 17.

(*m*) See the M. S. Act, 1854, ss. 122—125, and the M. S. Act, 1862, s. 15; *post*, Chap. IV. CREW.

(*n*) See also *post*, Chap. IV. CREW.

(*o*) The 32 Vict. c. 11. As to the details of this Act, see App. p. cccv. See also Appendix, "Orders in Council—Certificates of Competency," pp. 1—12.

who, before the 1st of January, 1851, had served as master or mate in the British merchant service, or before the 1st of January, 1854, as master or mate on board home trade passenger ships. Similar certificates may be claimed by all persons who have attained the rank of lieutenant, master, passed mate or second master, or any higher rank in the Queen's or the Indian service (*p*).

No foreign going ship or home trade passenger ship may go to sea from a port in the United Kingdom unless the master, and, in the case of foreign going ships, the first and second mates, or only mate, and in the case of home trade passenger ships, the first or only mate, have certificates of competency or service appropriate to or above their stations in the ship (*q*). And every steam ship which is required to have a master possessing a certificate must have an engineer possessing a certificate (*r*). The master of every foreign going ship must, upon signing the agreement with the crew, produce to the mercantile marine superintendent these certificates of competency or service. In the case of running agreements, the certificate of any mate first engaged on the second or subsequent voyages must on such voyages be produced in like manner. In the case of home trade passenger ships, the certificates must be produced half-yearly to the mercantile marine superintendent. The mercantile marine superintendents are bound to give to the masters, both of foreign going ships and home trade passenger ships, a certificate of their compliance with the provisions above mentioned, without which they cannot proceed to sea, or, in the case of a foreign going ship, be cleared outwards (*s*).

The Merchant Shipping Act, 1854, enabled the Board of Trade to cancel or suspend certificates, whether of competency or service, of any master or mate in certain cases of incompetency

Cancellation
of certificates.

(*p*) The M. S. Act, 1854, s. 135. Similar provisions apply to engineers. See *post*, Chap. IV. CREW.

(*q*) *Id.* s. 136. Where the tonnage of the ship equals or exceeds 100 tons, at least one officer besides the master must have a proper certificate. *Id.*, and see the same section as to the penalties incurred by the breach of these provisions. By sect. 137, certificates for foreign going ships are declared to be of higher grade than

corresponding certificates for home trade passenger ships. See further as to the duplicates of these certificates, the granting of copies of them in certain cases, and as to the punishment for false representations made to obtain them. Sects. 138, 139, 140.

(*r*) The M. S. Act, 1862, s. 5.

(*s*) The M. S. Act, 1854, ss. 161, 162; the M. S. Act, 1862, s. 10. And see Appendix, "Forms," Nos. 22, 22A, and 27A.

or misconduct, and provided for due inquiry being made by tribunals named in the Act into such charges. The Merchant Shipping Act, 1862, vests the power of cancelling or suspending the certificate, except in cases where the master is shown to have been convicted of an offence, in the tribunals by which the case is investigated, and the Merchant Shipping Act, 1876, confers the same power in certain cases upon a wreck commissioner.

The Merchant Shipping Act, 1876, which repealed similar provisions of a like character in the Merchant Shipping Acts of 1854 and 1862, enacted that the wreck commissioner, justices, or other authority holding a formal investigation into a shipping casualty, should hold the same with the assistance of an assessor or assessors. The Shipping Casualties Investigation Act, 1879, contains further provisions respecting the appointment of assessors for such investigations, and provides (t) that where any such investigation involves, or appears likely to involve, any question as to the cancelling or suspension of the certificate of a master, mate or engineer, it shall be held with the assistance of not less than two assessors having experience in the merchant service.

The Board of Trade may, if they deem it just, re-issue and return any certificate, or shorten the time of suspension, or grant a new certificate of the same or of a lower grade (u).

(t) The 42 & 43 Vict. c. 72, s. 3.

(u) The M. S. Act, 1862, s. 23, sub-s. 4. The following summary of the provisions of the statutes, prior to the Shipping Casualties Act of 1879, may be found useful:—The 241st section of the M. S. Act, 1854, provides, that if the Board of Trade, or any local marine board, has reason to believe that any master or mate is, from incompetency or misconduct, unfit to discharge his duties, the board may either institute an investigation, or may direct the local marine board at or nearest to the place at which it may be convenient for the parties to attend, to institute the same, and thereupon such persons as the Board of Trade may appoint for the purpose, or, as the case may be, the local marine board, shall, with the assistance of a local stipendiary magistrate, or of a competent legal assistant, to be appointed by the Board of Trade, conduct the investigation in the manner pointed out in the section, and shall, on the conclusion of the investigation, make

a report on the case to the Board of Trade; and in cases where there is no local marine board before which the parties can conveniently attend, or where such local marine board is unwilling to institute the investigation, the Board of Trade may order the same to be instituted before two justices or a stipendiary magistrate, and thereupon such investigation shall be conducted, and the results thereof reported in the same manner, and with the same powers in and with which formal investigations into wrecks and casualties are directed to be conducted, and the results thereof reported under the provisions contained in the eighth part of this Act, save only that if the Board of Trade so directs, the person bringing the charge of incompetency or misconduct to the notice of the Board of Trade shall be deemed to be the party having the conduct of the same.

The 242nd section provides that the Board of Trade may suspend or cancel the certificate of any master or mate—

The Shipping Casualties Investigations Act, 1879, s. 2, provides that where an investigation into the conduct of a master, mate, or other person in charge of a British vessel, who fails, without reasonable excuse, in case of collision, to render such assistance or give such information as is required by the Act, shall be deemed guilty of a misdemeanor, and if he is a certificated officer, an inquiry into his conduct may be held, and his certificate may be cancelled or suspended.

"1. If upon any investigation made in pursuance of sect. 241, he is reported to be incompetent or to have been guilty of any gross act of misconduct, drunkenness, or tyranny.

"2. If upon any investigation conducted under the provisions contained in the eighth part of this Act, or upon any investigation made by a Naval Court (see sect. 262), it is reported that the loss or abandonment of, or serious damage to, any ship, or loss of life has been caused by his wrongful act or default.

"3. If he is superseded by the order of any Admiralty Court (see sect. 240) or any Naval Court (see sect. 26).

"4. If he is shown to have been convicted of any offence.

"5. If upon any investigation made by any Court or tribunal authorized, or hereafter to be authorized by the legislative authority, in any British possession, to make inquiry into charges of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such Court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness or tyranny, or that the loss or abandonment of, or serious damage to any ship, or loss of life has been caused by his wrongful act or default, and such report is confirmed by the governor of such possession."

The provisions above referred to with respect to investigations conducted under the eighth part of the said Act are contained in the 432nd and the following sections, and are in substance as follows:—Such investigations are to be conducted before two justices or a stipendiary magistrate, and may be instituted on the application of an inspecting officer of the coast guard, or a principal officer of customs, or by the direction of the Board of Trade in any of the following cases:—

1. Whenever any ship is lost, abandoned, or materially damaged on or near the coasts of the United Kingdom;
2. Whenever any ship causes loss or material damage to any other ship on or near such coast;
3. Whenever, by reason of any casualty happening to or on board of any ship on or near such coast, loss of life ensues;

4. Whenever any such loss, abandonment, damage, or casualty happens elsewhere, and any competent witnesses thereof arrive at any place in the United Kingdom;

The justices or stipendiary magistrate shall send a report to the Board of Trade, and they may call for the certificate of the master or mate, and they may either return the same, or, if their report is such as to enable the Board of Trade to cancel or suspend the certificate, they shall forward the certificate to the Board of Trade, to be dealt with as the board may think fit.

The 11th section of the M. S. Act, 1862, extends the provisions of the 241st section of the M. S. Act, 1854, to certificated engineers. The 23rd section of the M. S. Act, 1862, enacts that the power of cancelling or suspending the certificate of a master or mate, conferred by the 242nd section of the M. S. Act, 1854, shall, except in the case provided for by the 4th paragraph of the section, vest in and be exercised by the Local Marine Board, magistrates, Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated, and not by the Board of Trade, and that such power shall extend to the cancelling or suspending the certificates of engineers. The same section requires that the decision of the tribunal shall be delivered in open Court, and a full report of all the proceedings forwarded to the Board of Trade; and it provides that the Board of Trade may, if they think the justice of the cases require it, re-issue and return any certificate which has been cancelled or suspended.

The M. S. Act, 1873 (s. 16), enacts that every master or person in charge of a British vessel, who fails, without reasonable excuse, in case of collision, to render such assistance or give such information as is required by the Act, shall be deemed guilty of a misdemeanor, and if he is a certificated officer, an inquiry into his conduct may be held, and his certificate may be cancelled or suspended.

The M. S. Act, 1876, contains provisions for the appointment of wreck commissioners for investigating shipping casualties. It provides (sect. 29) that it shall be the duty of a wreck

master, mate or engineer, or into a shipping casualty, has been held under the Merchant Shipping Act, 1854, or any act amending the same, or under any provision for holding such investigations in a British possession, the Board of Trade may, in any case, and shall, if new and important evidence which could not be produced at the investigation has been discovered, or if for any other reason there has in their opinion been ground for suspecting a miscarriage of justice, order that the case be reheard, either generally or as to any part thereof, and either by the Court or authority by whom it was heard in the first instance, or by the wreck commissioner, or in England or Ireland by a judge of her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases, or in Scotland by the Senior Lord Ordinary, or any other judge in the Court of Session whom the Lord President of that Court may appoint for the purpose (x). And the same section further provides that where in any such investigation, a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate or engineer, and an application for a re-hearing has not been made or has been refused, an appeal shall lie from the decision to the following Courts: namely,—

- (a.) If the decision is given in England or by a naval Court, the Probate, Divorce and Admiralty Division of her Majesty's High Court of Justice:
- (b.) If the decision is given in Scotland, either division of the Court of Session:
- (c.) If the decision is given in Ireland, the High Court of Admiralty, or the judge or division of her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases (y).

commissioner, at the request of the Board of Trade, to hold any formal investigation into a loss, abandonment, damage, or casualty under the eighth part of the M. S. Act, 1854, and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and all the provisions of the M. S. Acts, 1854 to 1876, with respect to investigations conducted under the eighth part of the M. S. Act, 1854, shall apply to investigations held by a wreck commissioner.

A wreck commissioner, it seems, does not possess the power conferred on justices by the 241st section of the M. S. Act, 1854, and his jurisdiction to cancel

or suspend a master or mate's certificate seems to extend only to the cases mentioned in the 432nd section of the M. S. Act, 1854. *Ex parte Story*, 3 Q. B. D. 166. See generally as to the cancellation of certificates, *Ex parte Ferguson*, L. R., 6 Q. B. 280. False swearing before a court of inquiry is perjury, *Reg. v. Tomlinson*, L. R., 1 C. C. R. 49. As to the practice before such courts, see *Reg. v. Collingridge*, 34 L. J., Q. B. 9.

(x) The 42 & 43 Vict. c. 72, *supra*, App. 169.

(y) The same section provides that any re-hearing or appeal shall be subject to and conducted in accordance

The Officers of Naval Reserve Act, 1863 (26 & 27 Vict. c. 67), provides for her Majesty accepting the services of masters or mates of merchant ships to serve as officers on board her Majesty's ships. The 17th section of the Merchant Shipping Act, 1872, provides that her Majesty may accept offers of persons recommended by the Admiralty to serve as officers of the Royal Naval Reserve.

Officers of
Naval Re-
serve.

Secondly, as to the appointment and remuneration of the master. **APPOINTMENT.** It often occurs that the master is also a part owner of the ship he commands, in which case his appointment is a matter of agreement between himself and the other owners (*s*). Where this is not so, the right of appointing him is vested in the owner, or, if there be more than one owner, in the majority, in proportion, not to their number, but to the amount of their interest in the ship (*a*). Cases may, however, arise in which it may become necessary, for the prosecution of the voyage, to appoint a master, although no communication can be had with the owners. In one instance where, as a measure of necessity, the consignees of a cargo appointed a master in the stead of one who had deserted at a foreign port, the Court of Admiralty said, that it would feel strongly inclined to hold him entitled to the privileges and competent to discharge the functions of a master appointed in the most regular manner (*b*). And the same Court upheld the appointment of a master made by a British consul at a foreign port, to which the ship had come after the master had been murdered in a mutiny (*c*).

The name of the master must be entered or endorsed upon the certificate of registry (*d*).

In every contract of service between the owner of a ship and the master or any seamen, whether express or implied, there is a statutory obligation that the owner and every agent engaged in preparing the ship for sea shall use all reasonable efforts to insure the seaworthiness of the ship at the commencement of and during the continuance of her voyage (*e*).

with such conditions and regulations as may from time to time be prescribed by general rules made under the M. S. Act, 1876, s. 30.

(*s*) When this is the case, it is necessary carefully to observe in which of his two characters he does any particular act. See *ante*, Chap. II. OWNER.

(*a*) Molloy, B. 2, c. 1, s. 4.

(*b*) See the judgment of Sir W. Scott in *The Alexander*, 1 Dods. 281.

(*c*) *The Cynikia*, 16 Jur. 748. See also *The Eliza Cornish*, 17 Jur. 738; S. C. 1 Spinks, 36.

(*d*) The M. S. Act, 1854, ss. 44, 46. See *post*, 131, n. (*m*).

(*e*) The M. S. Act, 1876, s. 5.

REMOVAL.

The right to remove the master is, in ordinary cases, vested in the persons who have the right to appoint him (e). It is provided, however, by the Merchant Shipping Act, 1854, that a Court of Admiralty may, upon the application of the owner of any ship which is within its jurisdiction, or on that of his agent or of a part owner or consignee, or of a certificated mate, or of one third or more of the crew, remove the master of the ship, if it be proved on oath to the satisfaction of the Court that the removal is necessary. In these cases the Court may, with the consent of the owner, agent or consignee (or without their consent if they are not within the jurisdiction), appoint a new master (f).

By the same statute, any naval court held on the high seas or abroad may, if unanimous that the safety of the ship or crew or the interest of the owner absolutely requires it, supersede the master and appoint another in his stead. The consent, however, of the consignee of the ship, if he be at the place where the inquiry takes place, must be obtained to the appointment of the new master (g).

WAGES AND
REMUNERA-
TION OF
MASTER.

The principal source of remuneration to the master for his services is the wages which he receives from the owner. As the consideration for this is the performance of his duty, if he be guilty of any gross misconduct, as barratry or habitual drunkenness, or exhibit gross incapacity, it seems that an entire forfeiture of his wages will ensue (h). But circumstances seldom occur to call for the enforcement of this extreme rule. Where, however, the master by his neglect or misconduct has occasioned

(e) Where the contract with the master contained the following terms:—"Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship." It was held that the master could not (except under unusual circumstances) be dismissed without a reasonable notice. *Green v. Wright*, 1 C. P. D. 591.

(f) The M. S. Act, 1854, s. 240. An attempt to defraud constitutes a sufficient necessity for removal to induce the Court to act under this section,

which is not limited to the class of persons enumerated in sect. 239. *The Royalist*, Br. & L. 46; 32 L. J., P. M. & A. 105. By sect. 241, the Board of Trade, or any local marine board, is empowered to institute an investigation in any case in which they have reason to believe that any master or mate is from incompetency or misconduct unfit to discharge his duties.

(g) The M. S. Act, 1854, s. 263. As to the constitution of these naval courts, see *post*, Chapter IV., *CREW*.

(h) *The Thomas Worthington*, 3 W. Rob. 128; *The Atlantic*, Lush. 566; *The Exeter*, 2 O. Rob. 261; *The Blake*, 1 W. Rob. 73; *The Lima*, 3 Hagg. 356.

loss to the owners of the ship, he is liable to compensate them for such loss; and in a suit for wages instituted by the master the owners may claim to deduct from his wages the amount of such loss (i).

In considering the acts of the master, it must be remembered that nothing more can be required from him than the honest exercise of his own discretion, according to the degree of ability and experience in business which such an officer may fairly be supposed to possess, and that a mere error of judgment on his part, not tainted with any guilty intention or corrupt motive, cannot be regarded as negligence or misconduct (k).

The old rule, that freight is the mother of wages, did not extend to the salary of the master (l).

The master is usually entitled, in addition to the pay which Primage. he may stipulate to receive from those who employ him, to *primage*, which is mentioned in the bills of lading thus, "with primage and average accustomed" (m). This is a small payment made by the owner or consignee of the goods to the master for his care and trouble, which varies in amount according to the particular trade in which the ship is engaged. The master may sue the consignee for it, although the freight has been settled with the shipowner (n); but if by the contract between the owner and the master, the master is not to receive primage, he can maintain no action for it (o).

(i) *The Repulse*, 4 No. Ca. 169; *The New Phoenix*, 2 Hagg. 420. This was the rule in the Admiralty Court even before the Judicature Act of 1873; now, of course, the owners possess the right of counterclaim conferred by the Act.

(k) See the judgment of Dr. Lushington in *The Thomas Worthington*, 3 W. Rob. 128, and *The Camilla*, Swa. 312.

(l) *Hawkins v. Twizell*, 5 E. & B. 883.

(m) The older books speak also of *average* as a payment to the master. As to master's gratuity, see *Howitt v. Paul*, 5 Sess. Ca. (4th series), p. 321.

(n) *Best v. Saunders*, Mo. & Mal. 268.

(o) See *Caughy v. Gordon*, 3 C. P. D. 419. There the charterer engaged the ship at a specified freight per ton in full, the master, who was engaged by his owners at a fixed salary to include "all charges and allowances," signed a bill of lading, making the

goods deliverable to order or assigns on payment of freight with 5 per cent. primage, and the cargo was received by the defendants, who were indorsees of the bill of lading and agents of the charterers: it was held in an action brought against them by the master that they were not liable to pay primage. In the earlier case of *Best v. Saunders*, Mo. & Mal. 268, where by the bill of lading goods were to be delivered to the consignee, "he paying freight for the same as per charter-party, with primage and average accustomed," and the agreement between the shipowner and consignee (there being no actual charter-party) was for so much per ton, not mentioning primage; it was held that the master was entitled to primage from the consignee, although his bargain with the owner was to receive beyond his wages a sum certain "for all cabin or other allow-

Trading on
his own ac-
count.

The law considers, however, on obvious grounds of policy, that the master is engaged to devote the whole of his time and attention to the concerns of his owner, and it, therefore, does not allow him to trade on his own account (*q*), or to hire out his services, or any part of them, to another. Should he do so, he is not entitled to receive any earnings derived from such a contract, and if they have been paid to the owner, the latter is entitled to retain them (*r*). For the same reason the master may not claim premiums for himself which arise out of transactions in which he is engaged on behalf of his employers, even although a contrary usage may have prevailed in this respect (*s*).

REMEDY FOR
WAGES.

The master could not formerly sue in the Admiralty Court for his wages (*t*); but the 7 & 8 Vict. c. 112, s. 16, conferred upon him, in the case of the bankruptcy or insolvency of the owner, the same rights, liens and remedies as the other mariners (*u*). Now, however, it is provided by sect. 191 of the Merchant Shipping Act, 1854, that every master shall have the same rights, liens and remedies (*v*), for the recovery of his wages, as any seaman, not being a master; and if in any proceeding in any

ances," Lord Tenterden being of opinion that the last-mentioned words did not apply to an allowance in the nature of prize. See also *Charleton v. Cotencorth*, R. & Moo. 176, and *post*, Chap. VI. CONTRACT OF AFFREIGHTMENT.

(*q*) *Gardner v. M'Cutcheon*, 4 Beav. 534.

(*r*) *Thompson v. Havelock*, 1 Camp. 527.

(*s*) *Diplock v. Blackburn*, 3 Camp. 43; *Shallcross v. Oldham*, 2 Johns. & H. 609.

(*t*) *Bayly v. Grant*, 1 Salk. 33; *per* Sir W. Scott, in *The Lord Hobart*, 2 Dods. 104; *Barber v. Wharton*, 2 Ld. Raym. 1452. If, however, the mate became master during the voyage, he might sue in the Court of Admiralty for wages due to him as mate during the whole time, but not as master for the time during which he served in that capacity. See *The Favourite*, 2 Rob. 232; *Read v. Chapman*, 2 Str. 937; and Lord Stowell's judgment in *The Batavia*, 2 Dods. 500. The owners may, however, go into the whole account. *The Caledonian*, 1 Swa. 17; *The Mary Ann*, L. R., 1 A. & E. 8.

(*u*) See *post*, Chap. IV. CREW. This statute is now repealed. It was held in the Admiralty Court, that to entitle a master to sue there for his wages under it, the owner must have been insolvent in the legal sense of the word, and not merely under a general inability to pay his debts. *The Princess Royal*, 2 W. Rob. 373. Where an owner had committed an act of bankruptcy by filing a declaration of insolvency, and two months had expired, but no commission had issued, this was held not to be a case of bankruptcy under the statute so as to entitle the master to sue. *The Great Northern*, 2 W. Rob. 509; see also *The Tecumseh*, 3 *ib.* 109. It was also considered doubtful whether the statute applied where some only of several part owners were bankrupt. See *The Simlah*, 15 Jur. 865, and the 7 & 8 Vict. c. 112, s. 63, (the interpretation clause).

(*v*) He is entitled to double pay under the 187th section of the M. S. Act, 1854; to compensation for a reduction of provisions under the 223rd section. *The Princess Helena*, Lush. 190; *The Josephine*, Swab. 428.

Admiralty or Vice-Admiralty Court (*x*), touching the claim of a master to wages, any set-off or counter-claim (*y*) is set up, the Court may adjudicate upon and settle all questions and accounts arising and unsettled between the parties, and direct the payment of any balance found due. The master of a foreign ship may claim the benefit of this provision (*z*). Before the passing of the Judicature Act, it was held that this section applied only where the set-off was one of the matters of dispute between the parties actually before the Court; for instance, where a master and part-owner, who had bound himself by a bottomry bond on ship, freight and cargo, brought a suit against the ship for wages, the Court refused an application made by the owner of the cargo hypothecated to stay proceedings in the wages suit (*a*). But now the provisions of the Judicature Act confer upon the Court more extended powers with respect to the rights of third parties (*b*).

Under the above-mentioned section of the Merchant Shipping Act it was held that the master's claim was confined to wages, and that he could not in the first instance make any claim in respect of advances or disbursements, although, if the owners set up any counter-claim, the Court would then go into the whole account between the parties (*c*). But to remedy this inconvenience the Admiralty Court Act, 1861, s. 10, conferred jurisdiction upon the Admiralty Court over any claim made by a master for wages earned by him on board the ship, and for disbursements made by him on account of the ship (*d*).

Disbursements.

(*x*) As to the establishment and jurisdiction of Vice-Admiralty Courts in the Colonies, see the "Vice-Admiralty Courts Act, 1863," (26 Vict. c. 24), and the Vice-Admiralty Courts Act Amendment Act, 1867, 30 & 31 Vict. c. 45. See the 56 Geo. 3, c. 8, and the 2 & 3 Will. 4, c. 51, as to Vice-Admiralty Courts in India. As to the existing Vice-Admiralty Courts, see Appendix, p. cxxlii. As to the Vice-Admiralty jurisdiction of the Consular Court at Constantinople, see *The Laconia*, Br. & L. 117. The Supreme Court of Her Majesty in China possesses a Vice-Admiralty jurisdiction. See "Order in Council," 18th August, 1878.

(*y*) As to the meaning of counter-claim in this Act, see *The City of Mobile*, L. R., 4 A. & E. 191.

(*z*) *The Milford*, Swab. 362. As to notice to a foreign consul, see *The Nina*,

L. R., 2 P. C. 38, and the Rules of Supreme Court, Ord. V. r. 11.

(*a*) *The Daring*, L. R., 2 A. & E. 260.

(*b*) The Judicature Act, 1873, s. 24, sub-s. 3, Ord. XVI. rr. 17—21; Ord. XIX. r. 3. As to the duty of the master to furnish accounts before suing, see *The Fleur de Lis*, L. R., 1 A. & E. 49.

(*c*) *The Caledonian*, 1 Swab. 17; *The Mary Ann*, L. R., 1 A. & E. 8.

(*d*) The 24 Vict. c. 10, s. 10. This section provides, that "if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court." But see *supra*, p. 98, note (*l*), as to costs. As to the costs of the reference, when the claim is referred to the registrar

A claim for damages for wrongful dismissal is included under a claim for wages (*f*). Only money actually expended by the master can properly be treated as disbursements (*g*), and he will not, as a general rule, be allowed to make any claim in respect of a liability which he has not discharged. But where the master has incurred liabilities on account of the ship in respect of items which have not been paid at the time of the institution of the suit, the Court will frequently allow the items, and at the same time direct that no order for payment be made until they have been discharged (*h*). It is the duty of the master to furnish accounts before suing (*i*). The fact that the master is also part-owner does not take away his right to sue for wages (*j*).

Period up to which the master may claim wages.

The provisions of the Merchant Shipping Act, 1854, which regulate the rights of seamen to wages in case of the wreck of the ship, and which relate to the wages of seamen dying during a voyage, apply to the master (*k*). Where a master was compelled by pressing necessity of ill-health to leave his ship at a port in the British colonies, it was held he was entitled to sue immediately for his wages (*l*). And in a case where a master was wrongfully discharged abroad, he was held to be entitled to wages up to the period when he obtained other employment (*m*).

County Court jurisdiction.

County Courts having Admiralty Jurisdiction have jurisdiction over actions for master's wages where the amount claimed does not exceed 150*l.* (*n*).

Maritime lien of master.

Formerly, the master had no maritime lien on the ship (*p*), or freight (*q*), for his wages, or for disbursements on account of the ship during the voyage. We have seen, however, that under the Merchant Shipping Act, 1854, he has now the same liens and remedies for his wages as the seamen have; and the seamen have, independently of statute, a lien upon the ship and freight

and merchants and reduced, *The Lemuella*, Lush. 147; *The James Seddon*, L. R., 1 A. & E. 379.

(*f*) *The Great Eastern*, L. R., 1 A. & E. 384; *The Blessing*, 3 P. D. 35.
(*g*) *The Chieftain*, Br. & L. 104;
The Edwin, *ibid.* 281.

(*h*) *The Feronia*, L. R., 2 A. & E. 65; *The Glentanner*, Swab. 415; *The Limerick*, 1 P. D. 292, 411.

(*i*) *The Fleur de Lis*, L. R., 1 A. & E. 49.

(*j*) *The Feronia*, L. R., 2 A. & E. 65; *The Daring*, *ib.* 280.

(*k*) The M. S. Act, 1854, ss. 184, 185; and see *post*, WAGES.

(*l*) *The Rajah of Cochin*, Swab. 473.

(*m*) *The Camilla*, Swab. 313.

(*n*) The 31 & 32 Vict. c. 71, s. 3, Appendix, p. CCXCVII.

(*p*) *Wilkins v. Carmichael*, 1 Doug. 101; *Hussey v. Christie*, 9 East, 426.

(*q*) *Smith v. Plummer*, 1 B. & A. 575.

for their wages, which lien is enforceable in the Court of Admiralty (*r*). The master has accordingly in that Court a maritime lien for his wages and for disbursements (*s*). The claim of the master for his wages earned subsequently (*t*) to the granting of a bottomry bond has priority over that of a bottomry bond holder, except where the master has bound himself by the bond to pay the money advanced (*u*), and his claim is preferred to that of a mortgagee (*x*). But where a master and part-owner of a ship orders necessaries whereby he becomes liable, the material man is entitled to be paid for them out of the proceeds of the ship and freight in priority to a claim of the master for wages and disbursements (*y*). The seamen's claim for wages takes, however, precedence of the master's claim, either for his own wages or for advance of wages made to the seamen (*z*).

The ordinary remedies of the master or mate may, it is obvious, be affected by their conduct in any particular case. Thus, where a mate, having the option at a foreign port to receive his wages in money, or by a bill upon the owners, preferred the latter, it was held that he had lost all claim against the ship, because, although where a creditor has taken a bill it is in general regarded as conditional payment only, yet if it be shown that the creditor took the bill in voluntary preference, he must be regarded as accepting it in satisfaction of his debt (*a*). Where a master had several times balanced accounts with the owner, which included disbursements and wages, and had re-

Cases in which a claim for wages may be satisfied by the master accepting a bill of exchange.

(*r*) See *post*, Chap. IV. CREW.

(*s*) See the judgment of Dr. Lushington in *The Ella A. Clark*, 32 L. J., P. M. & A. 211; and in *The Mary Ann*, L. R., 1 A. & E. 8. This lien is not impaired by reason of his employer having a fraudulent possession of the ship, *The Edwin*, Br. & L. 281; 33 L. J., P. M. & A. 197; or by the master releasing his personal claim against the owner. *The Chieftain*, Br. & Lush. 212. Where the ship belongs to a company whose affairs are being wound up under the Winding-up Acts, the master should obtain leave to proceed in the admiralty, or should seek his remedy by proceedings in the winding up. *In re Australian Navigation Co.*, L. R., 20 Eq. 325; *In re Rio Grande Steamship Co.*, 5 C. D. 282. As to Bankruptcy, see *Halliday v. Harris*, L. R., 9 C. P. 668, and *In re T. C.*, L. R. (Irish), 11 Eq. 151.

(*t*) *The Jonathan Goodhue*, Swa. 524.

In the case of *The Hope*, Asp. Mar. Cas. vol. i. p. 563, it was decided by the registrar of the Admiralty Court that the claim of a bottomry bondholder was entitled to rank before the claim of a master for wages earned on a previous voyage before the granting of the bond.

(*u*) As to the right of the master to have the assets marshalled where there is enough to satisfy both the master and the holder of the bond, see *The Edward Oliver*, L. R., 1 A. & E. 379; see *post*, Chap. VIII.; and see *The Eugenie*, L. R., 4 A. & E. 123.

(*x*) *The Mary Ann*, L. R., 1 A. & E. 8.

(*y*) *The Jenny Lind*, L. R., 3 A. & E. 529.

(*z*) *The Salacia*, Lush. 545. See, however, *The Edward Oliver*, L. R., 1 A. & E. 379.

(*a*) See *The William Money*, 2 Hagg. 136.

ceived bills for the joint amounts, and there was nothing to show that the master had accepted the bills in satisfaction and discharge of his claim, it was held, that upon the owner becoming bankrupt, the bills being unpaid, the master had still his remedy under the 7 & 8 Vict. c. 112 (b).

Equitable lien on freight in respect of money expended to enable the ship to earn the freight.

Where a master entered into charter-parties abroad, and paid monies and incurred liabilities in fitting his ship to perform them, and on her arrival in England the owner was bankrupt, having mortgaged the ship, and the mortgagees seized her, it was held, on a bill filed by the master against the owner's assignees in bankruptcy, that he had an equitable lien on the freight, and was entitled to be reimbursed out of it (c).

Master may insure wages.

The master may insure his wages and any other interest which he may have in the ship or voyage. Unlike the other mariners, he might (even before the alteration in the law by which the right of the seamen to wages is made no longer to depend on the earning of freight) insure his wages; since the objections in the former case did not apply to that of the master, who was always entitled to his wages, although the ship was lost or captured (d).

AUTHORITY OVER CREW AND PASSENGERS.

Thirdly, as to the authority of the master over his crew or others on board. Whilst his vessel is afloat, the master is bound to maintain order and discipline on board, under the guidance of justice, moderation and good sense. His authority over his crew has been compared to that of a parent over his child, or of a master over his apprentice; these analogies, however, are not very close, and the safer rule is to consider the particular authority which the respective positions of the parties require (e). A master may order a delinquent mariner to be confined, or inflict corporal punishment upon him (f), and this authority exists not only whilst the ship is at sea, but also whilst she is in a foreign port or river (g). But it is only extreme cases, and where it is

(b) *The Simlah*, 15 Jur. 865; *Marsh v. Padder*, 4 Camp. 257; *Strong v. Hart*, 6 B. & C. 160.

(c) *Bristow v. Whitmore*, 31 L. J., Chan. 467, reversing the decision of the Lord Chancellor, 4 De G. & J. 325; *The Feronia*, L. R., 2 A. & E. 65.

(d) *King v. Glover*, 2 N. R. 206; *Webster v. De Tastet*, 7 T. R. 157; *Hawkins v. Twizell*, 5 E. & B. 883.

(e) The English authorities on this

subject are few. They are collected in Pritchard's Adm. Digest, tit. DAMAGE, PERSONAL. For the American cases, see *ibid.*, also 3 Kent, Com. 159; and a valuable note to the 5th American edition of Abbott on Shipping, p. 234, with the authorities there cited.

(f) *Molloy*, B. 2, c. 3, s. 12. *The Agincourt*, 1 Hagg. 271.

(g) *Lamb v. Burnett*, 1 C. & J. 291. The American Courts have laid down

absolutely necessary to preserve discipline, that corporal punishment should be inflicted, and it must in all cases be awarded with due moderation (*h*). The master is not bound to wait for an actual act of mutiny, but may use violence to prevent it, although it be only threatened (*i*). In all cases which admit of the delay, due inquiry should precede the punishment, and the party charged should be heard in his own defence (*k*). It is the duty of the master to cause a statement of the offence, and of any punishment which may be inflicted, to be entered in the official log (*l*). The position of passengers is different; but even over them the master has absolute control in all that is necessary for the safe and proper conduct of the vessel, but the exercise of such power in each instance is defined and limited by the necessity of the case. He may restrain them by force, if the safety of the ship or of those on board requires it (*m*); he may also, it would seem, exclude them from the table where the other passengers mess, if their conduct be improper (*n*). If the master exceeds the bounds of justice and moderation, he becomes a trespasser, and is liable to be sued either in the Admiralty (*o*) or in a common law court (*p*).

Fourthly, as to *the duties of the master*, we will consider them as they arise before the voyage, during the voyage, and after the voyage has been determined. DUTIES OF
THE MASTER.

Before the commencement of the voyage the duty of the master as regards the state of the ship, is identical with that of the owner (*q*). There are, however, other duties which fall Before the
voyage.

the very reasonable rule, that where it appears that the punishment is merited, they will not undertake to adjust exactly, according to their own idea of fitness and propriety, the balance between the offence and the punishment, and that they will not award damages unless the punishment is manifestly excessive. See the cases cited in the 5th American edition of Abbott on Shipping, 236.

(*h*) *Per* Lord Stowell, in *The Lowther Castle*, 1 Hagg. 385; *Murray v. Moutrie*, 6 C. & P. 471.

(*i*) *The Lima*, 3 Hagg. 346; and see *Bingham v. Garnault*, Buller, N. P. 17.

(*k*) See *per* Lord Stowell, in *The Agincourt*, 1 Hagg. 274.

(*l*) The M. S. Act, 1854, s. 244. See an account of the log, *post*, p. 140, and the remarks of Tindal, C. J., in *Murray v. Moutrie*, *ubi sup.*

(*m*) See the judgment of Lord Ellen-

borough in *Boyce v. Bayliffe*, 1 Camp. 60, and *King v. Franklin*, Post. & F. N. P. Rep. 360, and *post*, Chap. XI., PASSENGERS.

(*n*) *Prendergast v. Compton*, 8 C. & P. 454. See as to the enforcement by the master of sanitary regulations in passenger ships, *post*, Chap. XI., PASSENGERS.

(*o*) *The Enchantress*, 1 Hagg. 395; *The Centurion*, *ib.* 161; *The Ruckers*, 4 Rob. 73.

(*p*) *Watson v. Christie*, 2 B. & P. 224; *Aitken v. Bedwell*, M. & M. 68; *Rhodes v. Leach*, 2 Stark. 516; *Hannaford v. Hunn*, 2 C. & P. 148.

(*q*) *Ante*, p. 73. A master who takes to sea a ship so unseaworthy as to be likely to endanger the life of any person, is guilty of a misdemeanor, M. S. Act, 1876, s. 4. So also a master who proceeds to sea after he has been served with a notice or order

more immediately within his province; thus he must procure a competent crew, both as regards number and fitness for their duties; he must also conform to the requirements of the legislature as regards their engagement^(r), and a due supply of medicines and medical stores^(s); and on leaving port he must, if the ship be a foreign-going one, send to the nearest mercantile marine office a statement, in the form sanctioned by the Board of Trade, of every change in his crew up to that time^(t).

While in harbour master must obey directions of harbour master.

By the General Harbour Act, 10 & 11 Vict. c. 27, s. 53, masters, whilst their vessels are within any harbour or dock, or within the limits of any harbour-master's authority, must regulate their vessels in accordance with that act, or any special act by which the harbour is governed; and if, after due notice, they neglect to do so, they are liable to penalties not exceeding 20*l.* ^(u).

Duty to proceed to place of loading with due despatch.

The ship being properly fitted and manned, the master must, with due diligence, take her to the place where she is to receive cargo, since if he be guilty of any unreasonable delay or deviation, the shipowner will be liable to an action, and the insurances will be avoided; and if the delay or deviation be of such a character as to put an end to the whole object which the freighter had in view, the latter may be discharged from the contract ^(x). In all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage. All the authorities concur in stating that the voyage must be commenced within a reasonable time ^(y).

for the detention of his ship for unseaworthiness, before it is released by a competent authority, is subject to a penalty of 100*l.* In case he takes to sea any officer authorized to detain the ship he is liable to pay the expenses of the officer and a penalty of 100*l.*, or a sum not exceeding 10*l.* a day until the officer returns. *Id.* s. 34.

^(r) See *post*, Chap. IV., CREW.

^(s) See the M. S. Act, 1867, s. 4; the Passengers Act, 1855, s. 43; the M. S. Act, 1876, s. 20, and Appendix, "Forms," Nos. 36, 37, 39.

^(t) The M. S. Act, 1854, s. 158; and Appendix, "Forms," No. 24*a*.

^(u) The provisions of the 10 & 11 Vict. c. 27, which relate to the mode in which vessels must enter harbours, and how they must lie and be moored therein, and in what manner they must

discharge cargo, are contained in sects. 53—68. See *post*, Supp. App. p. 141. See also as to the River Thames "Orders in Council," Supp. App. p. 50. Where a collision arose from obedience to the orders of a harbour master, whose directions the master and crew were bound to obey, it was held, in the Admiralty Court, that the ship was not liable. *The Bilbao*, Lush. 149. As to the respective duties of the master and dock master, see *The Excelsior*, L. R., 2 A. & E. 268; *The Cynthia*, 2 P. D. 52.

^(x) *Jackson v. The Union Marine Insurance Co.*, L. R., 10 C. P. 125; *Tully v. Hourling*, 2 Q. B. D. 182. But as to the circumstances which justify delay, see *post*, p. 134, n. ^(a).

^(y) See *per Tindal, C. J.*, in *M'Andrew v. Adams*, 1 Bing. N. C. 29. See also

Before commencing the voyage he must obtain all necessary Custom House documents; he must also produce to the mercantile marine office superintendent the necessary certificates of competency or service of himself and his officers, and obtain from him a certificate of his having complied with this provision and with the regulations of the Merchant Shipping Act, 1854, with respect to agreements, which last-mentioned certificate must be produced to the officers of Customs before a clearance can be obtained (z).

Statutory
duties under
Merchant
Shipping and
Passengers
Acts.

There are also certain other requirements under the Merchant Shipping Acts and the Passengers Acts, 1855 and 1863, which must be observed before clearance. Thus, by the 19th section of the Merchant Shipping Act, 1854, no officer of Customs shall grant a clearance or transire for any ship required to be registered under the act for the purpose of enabling her to proceed to sea as a British ship, unless the master of such ship produces to such officer the ship's certificate of registry. By the 102nd section of the same act a clearance or transire may be refused for any ship unless the master of such ship has declared to the proper Customs officer the name of the nation to which he claims that the ship belongs, and such officer shall thereupon inscribe such name on the clearance or transire.

So, also, the officers of Customs may refuse a clearance or transire to any ship required to be provided with boats, or with life buoys, under the 292nd and 293rd sections of the Merchant Shipping Act, 1854, unless the same is duly so provided (a), or to any passenger steamship (b) liable to be surveyed under the Merchant Shipping Acts, unless the passenger certificate provided

Freeman v. Taylor, 8 Bing. 124; *Mount v. Larkins*, *ib.* 108; *Benson v. Blunt*, 1 Q. B. 870; *Cliphams v. Vertue*, 5 Q. B. 265; and *Phillips v. Irving*, 7 M. & G. 335. In *Tarrabochia v. Hickie*, 1 H. & N. 183, the Court of Exchequer was of opinion that the sailing with convenient speed, or in a reasonable time, was not a condition precedent to the charterer's liability to find a cargo. Where, however, a charter-party contains a stipulation that a ship shall sail on a particular day, time is ordinarily of the essence of the contract, and this is a condition precedent. See *Seeger v. Dutkie*, 8 C. B., N. S. 45. See also *Dohn v. Burness*, in the Exchequer Chamber, 32 L. J., Q. B. 204; *M'Andrew v. Chapple*, L. R., 1 C. P. 643; and the cases cited *post*, Chap. VI.

M.P.

Part I., CONTRACT OF AFFREIGHTMENT.

(z) The M. S. Act, 1854, ss. 161, 162; the M. S. Act, 1862, s. 10. In the case of home trade passenger ships, the certificates of competency and service must be produced to the shipping masters half-yearly. Every agreement with the crew, made for a home trade ship, must be transmitted half-yearly to a mercantile marine superintendent in the United Kingdom, who is bound thereupon to give a certificate to the master or owner, without which no home trade ship can go to sea. *ib.* See App. "Forms," No. 22A.

(a) The M. S. Act, 1854, s. 294. See also the M. S. Act, 1873, s. 15.

(b) The M. S. Act, 1854, s. 303, and the M. S. Act, 1876, s. 16.

K

for by the 318th section of the Merchant Shipping Act, 1854, be produced (c).

If any ship to which the above provisions of the Merchant Shipping Act, 1854, apply attempts to proceed to sea without a clearance or transire, the proper officer of Customs may detain her (d).

By the 30th section of the Merchant Shipping Act, 1862, it is provided that in any case where notice under the provisions of that section has been given to the master or owner of any ship that the ship is not properly provided with the lights and means of making fog signals, in pursuance of the regulations made under the powers of the Act, and such notice has been duly communicated to the collector of Customs at any port from which such ship may seek to clear, or at which her transire is to be obtained, no collector to whom such communication has been made shall clear such ship outwards, or grant her a transire without a certificate under the provisions of the Merchant Shipping Acts to the effect that the ship is properly provided with such lights and means of making fog signals (e).

In the case of passenger ships (f) subject to survey under the Passengers Acts, 1855 and 1863, it is necessary that before clearance the master should have obtained the Emigration officer's or Board of Trade's (g) certificate of clearance, and joined in executing the Passenger Bond required by the Passengers Act, 1855, s. 63, and signed and delivered the Passenger Lists required under the 16th section of the same Act.

The master before he can clear his ship or obtain a transire must also pay all light dues (h) payable in respect of the ship; the 400th section of the Merchant Shipping Act, 1854, providing that no officer of Customs at any place where light dues are payable shall grant a clearance or transire for any ship unless the receipt for the same is produced to him.

(c) The M. S. Act, 1854, s. 318; the M. S. Act, 1872, s. 8; the M. S. Act, 1876, s. 16.

(d) The M. S. Act, 1854, ss. 19, 102, 318.

(e) See the M. S. Act, 1862, s. 30, and the M. S. Act, 1876, ss. 11, 15, 21. See also Appendix, "Forms," No. 46.

(f) See the Passengers Act, 1863, s. 3.

(g) See the Passengers Act, 1855, s. 11, and the M. S. Act, 1876, s. 14.

(h) A list of the more material Orders in Council, under which light duties are payable to the London Trinity House, is given in the Appendix, "Orders in Council," p. 31. Light duties are now payable on deck cargo tonnage. See the M. S. Act, 1876, s. 23, and Appendix, "Forms," No. 45.

The statutory duties of the owner as to deck and load-lines have already been mentioned (*h*). A master, however, who neglects to mark and keep marked his ship as required by the Merchant Shipping Act, 1876, sects. 26 and 27, or allows her to be loaded so as to submerge the centre of the disc, or conceals, removes, alters, defaces or obliterates any of the required marks, or suffers others to do so, except to escape capture, incurs a penalty not exceeding 100*l*. (*i*).

It would be beyond the scope of this work to state in detail Customs Acts. the various requirements of the Customs Acts which impose duties on the master; the following remarks, however, may be found to be useful. The regulations at present in force relating to Customs are contained in the Customs Acts Consolidation Act, 1876 (the 39 & 40 Vict. c. 36); the Customs and Inland Revenue Acts, 1878 and 1879 (41 Vict. c. 15, and 42 & 43 Vict. c. 21) (*k*). The clauses of the first mentioned Act which relate to "*Exportation*," and "*Entry and Clearance Outwards*," contain the following provisions (*l*).

The master (*m*) of a foreign-going or home-trade ship must, before any goods are taken on board in the United Kingdom (except in certain cases in which special permission may be given), deliver to the collector of Customs the certificate of the ship's clearance inwards, or coastwise, on her last voyage. He must also deliver an entry outwards, signed by himself, of the ship for her intended voyage, which must be in the form and contain the particulars prescribed by the Act, and must, in addition, contain the particulars as to clear side required by the Merchant Shipping Act, 1876, s. 26 (*n*); and if she has commenced her lading at some other port, he must deliver to the searcher the clearance of such goods from such other port. This is the entry outwards of the ship; and if any goods are

Foreign-going and home-trade ships.

Entry.

(*h*) *Ante*, pp. 13, 14.

(*i*) The M. S. Act, 1876, s. 28.

(*k*) For a list of the old acts, see the 6 Geo. 4, c. 105, and the 8 & 9 Vict. c. 84, by which they were repealed.

(*l*) Sailing without clearing documents, contrary to the 16 & 17 Vict. c. 107, ss. 170—172, was held not to render the voyage illegal for all purposes; and a person not a party to the master's illegal acts can recover on a policy of insurance effected on the cargo and freight. *Cunard v. Hyde*, 1 E. B. & E. 670.

See also *Wilson v. Rankin*, L. R., 1 Q. B. 162; *Dudgeon v. Pembroke*, L. R., 9 Q. B., 96, 1 Q. B. Div. 96.

(*m*) The Commissioners of Customs may refuse to allow any person to do any act as master unless his name is indorsed on the certificate of registry. The M. S. Act, 1854, s. 46.

(*n*) See *ante*, p. 14. As to the duty of the master to deliver before entry a list of Asiatics carried on board as passengers or sailors, see the 4 Geo. 4, c. 80, s. 27.

taken on board before she is entered outwards the master forfeits 100%. Where it is necessary to load heavy goods before the whole of the inward cargo is discharged, the collector may issue a licence, called a stiffening order, for that purpose (*o*).

No warehoused or drawback goods may be shipped for exportation before the entry outwards of the ship and the entry of the goods, nor before they have been cleared for shipment (*p*). The exporter or his agent must, also, before the goods are shipped, deliver to the officer of Customs a shipping bill, with claim and declaration at the foot thereof, containing the particulars of the goods, in a form given by the Act (*q*). This document, when filled up and signed by the exporter and countersigned by the Customs officer, is the clearance for the goods (*r*).

Shipping bill.

No stores may be taken on board ship of forty tons or upwards, on a voyage beyond the seas, without an order for the shipment of them. The request for this must be signed by the master or owner, and the master or his agent authorized in writing must deliver to the export officer the stores content containing the particulars of them, and subscribe thereon, in the presence of the proper officer, a declaration that the contents are true, and that the requirements of the Merchant Shipping Acts with respect to outward-bound ships have been complied with, and an account of the stores shipped and already on board. This, when signed by the export officer and countersigned by the collector, is the victualling bill (*s*).

Victualling bill.

Before any ship can be cleared outwards, the master or other person authorized by him in writing must attend before the collector of Customs and answer such questions as are demanded of him concerning the ship, cargo and intended voyage (*t*), and must also sign and deliver a content of his ship in the form provided by the act, setting forth among other things her name and tonnage, the name of the master, and a description of the goods, unless such content be dispensed with by the Commis-

Clearance label.

(*o*) The 39 & 40 Vict. c. 36, s. 101. Where see exemptions in favor of vessels delivering goods at more than one port.

(*p*) *Ib.* s. 102. Where see also as to Sundays and holidays as to warehousing goods and goods entitled to drawback or exportable only under particular rules. See sect. 104.

(*q*) *Ib.* s. 105. If any goods for which entry before shipment is required are shipped without a compliance with the Act, they are liable to be for-

feited. *Ib.* s. 131. As to the Cocket in use formerly, see the 16 & 17 Vict. c. 107, s. 121. This was a document certifying that the Customs dues on the goods described on it had been paid or secured. See 2 Beaves, *Lex Merc.* 425; *Termes de la Ley*, "Cocket."

(*r*) *Ib.* s. 113.

(*s*) *Ib.* s. 126. See the 41 Vict. c. 15, s. 4, as to when the ship returns with an excessive deficiency of stores.

(*t*) The 39 & 40 Vict. c. 36, s. 123.

sioners of Customs (*u*), and before clearance, must deliver the certificates (if any) required by law (*v*), to the collector, who shall file them and the victualling bill with a label, called the clearance label, which, when filled up and signed by the Customs officer, is the clearance and authority for the departure of the ship.

If the ship leaves in ballast, not having any goods on board except stores borne upon the victualling bill, or goods reported inwards for exportation, the master must answer all such questions as are asked of him by the collector, touching the departure and destination of the ship; and thereupon the collector clears the ship in ballast (*x*).

The master or owner must within six days of the final clearance outwards of a ship in which goods are shipped for exportation, deliver to the proper officer of Customs a certificate if the ship be a steamer trading to a foreign port, of the Manifest. quantity of coals or fuel shipped for use on the voyage, and a manifest, containing an account of all the goods shipped for exportation, and, under a penalty, subscribe a declaration that the same contains a true account of all the cargo of the ship, unless a specification of the goods exported, comprising all the particulars prescribed by the act, be delivered with a like declaration (*y*).

In the case of a coasting ship, an account, with a duplicate, Coasting ships. containing the ship's name, her tonnage, port of registry and destination, and particulars of the goods laden on board, signed by the master, must be delivered to the collector, who is to retain the duplicate and return the original, dated and signed by him, and such account is the clearance of the ship for the voyage, and the transire for the goods (*z*).

(*u*) This has been dispensed with in the port of London.

(*v*) See the 39 & 40 Vict. c. 36, ss. 111, 113, 156.

(*x*) The 41 Vict. c. 15, s. 6. If a ship laden or in ballast departs without being cleared, her master is liable to a penalty of 100*l*.

(*y*) The 39 & 40 Vict. c. 36, ss. 110, 111. As to the cases where a specification is required, see *ib.* s. 110.

(*z*) The 39 & 40 Vict. c. 36, s. 145. But the same section provides that the Commissioners of Customs may permit general transires to be given. If the master fail to deliver a correct account he is liable to a penalty of 20*l*. The

147th section of the same act gives the officers of customs power to go on board and examine coasting ships. By the 42 & 43 Vict. c. 21, s. 9, the master of a coasting vessel is required to keep a cargo book stating the names of the ship, the master, and the port to which she belongs and of the port to which she is bound; and, unless the Commissioners of Customs otherwise direct, the master shall at every port of lading enter in such book the name of such port and an account of all goods taken on board such ship, stating the descriptions of the packages and the quantities and descriptions of the goods therein, and the quantities and

Fictitious
papers and
dangerous
goods.

The master should in no case carry any fictitious or colorable papers; neither should he take on board prohibited or unlawful goods, whereby the cargo may be made liable to seizure, or the policies of insurance may be rendered void (*a*). The Merchant Shipping Act, 1873 (*b*), contains restrictions against the shipping of dangerous goods—such as aquafortis, gunpowder, petroleum and other like substances, and attaches a penalty to their misdescription. The master or owner is empowered to refuse to take such goods on board, and may require suspected packages to be opened, and in certain cases may throw them overboard.

Port dues.

The master must pay all harbour, port, or other dues (*c*). He is, in general, personally liable for them (*d*); and, where there is a custom to that effect, it would seem that the anchor and sails may be distrained for port dues (*e*).

descriptions of the goods stowed loose and the names of the respective shippers and consignees, so far as such particulars are known to him, and he shall at every port of discharge of such goods note the respective days on which the same or any of them are delivered out of the ship, and the respective times of departure from every port of lading and of arrival at every port of discharge; and the master shall on demand produce such book for the inspection of any officer of Customs; and if upon examination any package entered in the cargo book as containing foreign goods shall be found not to contain such goods, such package with its contents shall be forfeited; or if any package shall be found to contain foreign goods not entered in such book, such goods shall be forfeited; and if the master fail to keep the cargo book correctly or to produce the same, or if at any time there be found on board the ship any goods not entered in such book, the master shall forfeit 20*l*.

(*a*) Molloy, B. 2, c. 2, ss. 7, 9. It is a misdemeanor for the master to carry any papers with intent to conceal the British character of a British ship. M. S. Act, 1854, s. 103, *ante*, p. 27. See *post*, Chap. VII., INSURANCE. Munitions of war may by Order in Council be prohibited to be exported or carried coastwards. The 39 & 40 Vict. c. 36, s. 138; the 42 & 43 Vict. c. 21, s. 8.

(*b*) The M. S. Act, 1873, ss. 23 to 27. See also the Explosives Act, 1875 (38 Vict. c. 17); the Petroleum Acts, 1871 and 1879 (34 & 35 Vict. c. 105; 42 &

43 Vict. c. 47), and Appendix, "Forms," 49, 49A, 49B, and "Orders in Council," pp. 25—29.

(*c*) The 48th section of the Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), provides that the proper officer of Customs for the district within which any harbour, dock or pier to which the provisions of that Act have been made applicable, may, with the consent of the Commissioners of Customs, refuse to receive any entry, give any clearance, or take any report inwards or outwards of any ship liable to pay the rates imposed by the special Act by which such harbour, dock or pier is regulated unless a certificate of the payment of such dues is produced or due security shown to have been given for such payment.

(*d*) Molloy, B. 2, c. 2, s. 9; *Mayor of London v. Hunt*, 3 Lev. 37; *Vinkerton v. Edden*, 1 Salk. 248. See, as to the meaning of the word "owner" in a charter granting dues payable by owners, *The Master Pilots of Newcastle v. Hammond*, 4 Exch. 285. See also *The Ribble Navigation Company v. Hargreaves*, 17 C. B. 385, where a somewhat similar question arose under a local statute.

(*e*) *Vinkerton v. Edden*, 1 Salk. 248. A power to distrain the ship, her tackle, apparel and furniture, is given by statute in the case of any rates imposed under acts incorporated with the Harbours, Docks and Piers Clauses Act, 1847. See the 10 Vict. c. 27, s. 43.

The necessary Custom House documents having been obtained, Lading cargo. the next duty which devolves upon the master is to load and stow the cargo entrusted to him (*f*), for which purpose he must be prepared with the necessary tackle for shipping, and with dunnage (*g*), or other requisites for properly stowing it. If any goods are injured by his or his agent's negligence whilst they are being shipped, he is liable (*h*) to his owners, and also directly to the shipper (*i*). It sometimes occurs that an agent specially appointed by the shipper, called a *stevadore* (*j*), is employed to load the cargo, in which case the master is ordinarily discharged from responsibility, unless he personally interferes (*k*). In a case where by the terms of the charter- Stevadore. party the *stevadore* was to be appointed by the charterer, but to be paid by and to act under the orders of the master, it was held, that the master was not liable for the negligence of the *stevadore*; the *stevadore* not being the agent or servant of the master, the control by the master being given only with a view to the safety and trim of the ship (*l*).

In the absence of custom or agreement to the contrary, goods Delivery of goods for shipment. intended for shipment are to be delivered to the master alongside the ship, but if the master receives goods at a wharf or quay, or in a boat belonging to the ship, he becomes responsible for their safe custody (*m*). Where goods going coastwise had, according to custom, been delivered to the mate of the vessel on the wharf, it was held that the responsibility of the ship had attached, although it did not appear that they had ever reached her (*n*).

(*f*) As to the master's duty to give notice that he is ready to load, see *Stanton v. Austin*, L. R., 7 C. P. 651. As to the stowage of grain cargoes, see the M. S. Act, 1876, s. 22, and *supra*, p. 37.

(*g*) 1 Beawes, Lex Merc. 163. *Dunnage* consists of loose wood or other matters placed at the bottom of the hold above the ballast to stow cargo upon. Dana's Seaman's Manual, p. 94.

(*h*) Laws of Oleron, art. 10; *Goff v. Clinkard*, cited in *Dale v. Hall*, 1 Wils. 282.

(*i*) See Story on Agency, §§ 314—318, and the observations of Willes, J., in *Blackie v. Stenbridge*, 6 C. B., N. S. 594.

(*j*) In the Consolato he is called "*Stibador*," and in modern Spanish "*Estibador*," from "*Estivar*," to stow.

(*k*) *Swanston v. Garrick*, 2 L. J., N. S., Exch. 525.

(*l*) *Blackie v. Stenbridge*, 6 C. B., N.

S. 894; affirmed Cam. Scac., *ib.* 911. See also Pardessus, Coll. des Lois Marit. vol. 2, p. 220. As to the liability of the owner in cases where a *stevadore* is appointed by the shipper, see *Anglo-African Company v. Lamzed*, L. R., 1 C. P. 226; *Sandeman v. Scurr*, L. R., 2 Q. B. 86. See also further as to the owner's liability, *ante*, OWNER, p. 77, and *post*, CONTRACT OF AFFREIGHTMENT.

(*m*) Molloy, B. 2, c. 2, s. 2.

(*n*) *Cobban v. Doune*, 5 Esp. 41. See also *The British Columbia Company v. Nettleship*, L. R., 3 C. P. 499. The rule of the Basilicon Constitutions (the Maritime Code of the Western Empire in the 9th Century), was, that the master was liable for things either given to him personally on shore, or in the ship, or received by a sailor with his consent, express or implied. See 1 Pardessus, Lois Maritimes, 173.

Where goods are delivered by the merchant to a wharfinger or lighterman for shipment, questions often arise as to when his responsibility determines and that of the master commences. This depends upon the express contract between the parties, or upon the general usage subject to which they have contracted.

Mate's receipt
and bill of
lading.

Upon the delivery of goods on board, the usual course is for the mate to give a receipt to the shipper, which is delivered to the master on his giving a bill of lading, the effect of which is to make him hold the goods on account of the person named therein, or his assigns, as the case may be. A master should not sign bills of lading until the receipt has been returned (*o*), or, where no receipt has been given, until he has received authority from the shipper to sign them; since he may otherwise be under a double responsibility, on the one hand to the shipper of the goods, and on the other to the holder of the bill of lading (*p*). Indeed, now by statute, every bill of lading in the hands of a *bonâ fide* holder for value is conclusive evidence against the master of the shipment of the goods, unless the holder had notice of the error, or the master can show that it was caused without any default on his part, by the fraud of the shipper or of the holder, or of some person under whom he claims (*q*). The master has no authority to bind his owners by signing bills of lading for goods which he has not received, and which have not been shipped (*r*).

Letters.

The master is bound to receive on board letters tendered to him for conveyance by the postmaster-general (*s*).

Care of cargo.

The cargo being once on board, the master is bound to take all possible care of it, both as regards protection from thieves and also against injuries from weather and the like. Subject to the protection afforded by the Merchant Shipping Act, 1854,

(*o*) *Craven v. Ryder*, 6 Taunt. 433; *Haues v. Watson*, 2 B. & C. 540; see also *Bryans v. Nix*, 4 M. & W. 775; *Evans v. Nichol*, 3 M. & G. 614; *Thompson v. Small*, 1 C. B. 328; *Gosling v. Birnie*, 7 Bing. 339. Bills of lading may be signed without the production of the mate's receipt if the goods are on board; the holder for value of such bills has a better title than the indorsee of the mate's receipt, *Hathosing v. Laing*, L. R., 17 Eq. 92. See *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*p*) *Ruck v. Hatfield*, 5 B. & A. 632; *Gosling v. Birnie*, *ubi sup.*

(*q*) The 18 & 19 Vict. c. 111, s. 3, Appendix, p. clxxvi. As to the effect of the words "weight, contents and value unknown," and also of a signature to a bill of lading by the agent of a shipowner, see *Jessel v. Bath*, L. R., 2 Ex. 267; and *Lebeau v. General Steam Navigation Co.*, L. R., 8 C. P. 88; *The Peter der Grosse*, 2 P. D. 414; and *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*r*) *McLean v. Fleming*, L. R., 2 Scot. Appeals, 128; and see *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*s*) See the 3 & 4 Vict. c. 96, s. 36, Supp. Appendix, p. 140.

s. 503, by the Merchant Shipping Act, 1862, s. 54, and by the terms of the bills of lading, the master is liable for any injury which the goods may meet with whilst on board, arising from bad stowage, wet, want of ventilation; also for damage done by rats, although he keeps cats on board (*t*). And subject to the exceptions introduced by statute, and by the terms of the contracts of carriage, the master and owners are liable if the goods are stolen in port, either by thieves from the land or by pirates. In an early case, where goods were taken in the river Thames by a force which overpowered the crew, it was held that the master was liable, like a common carrier, and was excused only in the case of loss by the act of God, or the king's enemies (*u*).

The master commits a clear breach of duty if he lingers in port when all is ready and the wind is fair; but he is not to set out on a voyage during tempestuous weather (*x*), or to leave the harbour under a well-founded fear of capture (*y*). He is bound to put his ship under the charge of a pilot, both on the outward and homeward voyage, when he is within compulsory pilotage waters (*z*), and also to observe, in all respects, the regulations of the port from which he is sailing (*a*).

Starting for voyage.

Where, as is generally the case in time of war, it is necessary,

(*c*) *Laveroni v. Drury*, 8 Exch. 166; *Kay v. Wheeler*, L. R., 2 C. P. 302; Emérigon (*Traité des Assur.* c. 12, s. 4) states the rule of the Admiralty law to be, that the master is liable if there are no cats on board, but adds, "Le patron ne répond pas du dommage causé par les rats, si les chats qui étaient à bord, sont morts pendant de voyage pourvu qu'au premier endroit où il a touché il n'ait rien oublié pour s'en procurer d'autres," for which position several authorities are cited. See also *Davidson v. Guynne*, 12 East, 381, and the foreign and American authorities cited in *Laveroni v. Drury*, *ubi sup.*

(*u*) *Mors v. Slew*, the fullest report of which is in 3 Keb. 72, 112, 135; *S. C.*, Sir T. Raymond, 220; 1 Mod. 85; 1 Vent. 190; Story on Bailm. ss. 496, 497; 3 Kent's Com. 213. In *Lane v. Cotton*, 12 Mod. 484, Lord Holt takes a distinction between a robbery of goods from a ship when at sea and when in a river. See also *Nugent v. Smith*, 1 C. P. D. 423.

(*x*) Molloy, B. 2, c. 2, s. 4. By the laws of Oleron, art. 2, the master was bound not to put to sea without having

first consulted with his crew.

(*y*) In *Pole v. Cetovich*, 9 C. B., N. S. 430, the master of an Austrian vessel had contracted by charter-party to proceed to a particular port, and had been ordered by the charterer to do so. War having broken out between France and Austria, the master delayed to proceed to this port under the belief that he would incur great risk of capture. He offered however to proceed if the charterers would insure the ship and freight fully. Under these circumstances it was held that the jury was justified in finding that he had not broken his contract. See also *The Teutonia* (*Duncan v. Köster*), L. R., 4 P. C. 171; *The San Roman*, L. R., 5 P. C. 301; *The Heinrich*, L. R., 3 A. & E. 424; *The Patria*, *ib.* 436; *The Express*, *ib.* 597. But he must not delay longer than is absolutely necessary. *The Patria*, L. R., 3 A. & E. 436.

(*z*) See *post*, Chap. V., PILOT.

(*a*) See *ante*, p. 128. If he does not bring up at the stations appointed by the Commissioners of Customs for the boarding or landing of the officers of Customs, he is liable to a penalty of 20*l*. The 39 & 40 Vict. c. 36, s. 46.

in order to comply with the provisions of an act of Parliament, or with the terms of a charter-party or policy of insurance, that the ship should depart with convoy, the master must use all necessary exertions for joining it at the appointed place, and for obtaining sailing orders from the officer in command (*b*).

**DUTIES
DURING THE
VOYAGE.**

The duties of the master with reference to lights, and to the course which he should take in order to avoid collision with other vessels will be found in Chapter IX. on COLLISION. In this chapter will also be found the important duty which now devolves upon the master, in case of collision, to stay by the other vessel so long as she needs assistance, the disobedience of which makes him guilty of a misdemeanor, and liable to have his certificate cancelled or suspended (*c*).

When once the voyage is commenced the master must proceed, without deviation, to the port of discharge, or to the point where orders for discharge are to be received. If he finds that no orders have arrived he is not bound to communicate with the charterer, but after waiting a reasonable time may proceed to a place named in the charter-party (*d*). Where a ship is sold during a voyage, the master is bound by the instructions of his owner the vendor until notice has been given to him by the vendees of the sale and termination of the vendor's authority (*e*). If the vessel deviates unnecessarily, the master and owners are responsible for any subsequent loss or injury that may occur, although it be by the act of God or the king's enemies (*f*). And if the vessel be insured the underwriter is discharged as regards losses occurring after the deviation (*g*). As between the master and his crew, however, he may at any time, subject to his liability for any breach of contract, vary the voyage, and the seamen cannot compel him to continue that which was originally intended (*h*).

(*b*) See *post*, Chap. VII., INSURANCE. If the master, when under convoy, wilfully disobeys orders or deserts the convoy, he is liable to a penalty of 500*l.* and to imprisonment. The 27 & 28 Vict. c. 25, s. 46, Appendix, p. cclv. See also the 29 & 30 Vict. c. 109, s. 31.

(*c*) See the M. S. Act, 1873, s. 16.

(*d*) *King v. Maas*, 6 E. & B. 670.

(*e*) Per Kelly, C.B., in *The Mercantile Bank v. Gladstone*, L. R., 3 Ex. 239.

(*f*) *Davis v. Garrett*, 6 Bing. 716; *Parker v. James*, 4 Camp. 112.

(*g*) See *post*, Chap. VII., INSURANCE. Deviation for the purpose of saving property has been held not to be jus-

tifiable as against the owners of cargo, but it seems that deviation for the purpose of saving life is justifiable. *Stamp v. Scaramanga*, 4 C. P. D. 316; *The Scindia*, L. R., 1 P. C. 241; *The True Blue*, *ib.* 250; *The Sir Ralph Abercrombie*, *ib.* 454; *The Thetis*, L. R., 2 A. & E. 365.

(*h*) Per Sir W. Scott, in *The Elizabeth*, 2 Dods. 408. But it seems the seamen may leave the ship if the ship is employed on a voyage altogether different from that for which they were engaged. See *Burton v. Pinkerton*, L. R., 2 Ex. 340. See *post*, Chap. IV., CREW.

The master is bound to communicate to his employers during the voyage, when opportunities occur, intelligence of any events which may affect their interests. This duty exists more especially in case any accident happens to the ship, since, in the absence of this information, the owners may, after the occurrence of a material injury to the vessel, and in ignorance of the fact, effect insurances which would be thereby avoided (*i*). In the case of steamers a further duty is imposed by statute on the master, to communicate to the Board of Trade the intelligence of any material injury caused or sustained by the vessel or crew, within twenty-four hours afterwards, or as soon as may be practicable (*k*).

If a disaster occurs to the ship or cargo in a port where correspondence cannot be had with the freighter, the master must act as his agent, and use his best efforts for the protection of the cargo (*l*).

The master is the proper person to have the custody of the ship's papers. They consist usually of the following documents:—

THE CERTIFICATE OF REGISTRY (*m*), which may be used only for the lawful navigation of the ship, and must be delivered up on request to the person for the time being entitled to the custody of it for these purposes, or to any registrar, officer of Customs or other person entitled to require its delivery, subject to a penalty of 100*l*. (*n*). Certificate of registry.

THE AGREEMENT with the seamen, the particulars of which are regulated by the Merchant Shipping Act, 1854 (*o*). The agreement.

(*i*) *Gladstone v. King*, 1 M. & S. 35. See also the M. S. Act, 1873, s. 22, as to the duty of the managing owner to communicate with the Board of Trade.

(*k*) The M. S. Act, 1854, s. 326. See also *post*, Chap. IX. COLLISION.

(*l*) See *per* Lord Stowell, *The Grati-tudine*, 3 Rob. 259; *Notara v. Henderson*, *per* Cur., L. R., 5 Q. B. 353; *S. C.*, Cam. Scacc., L. R., 7 Q. B. 226; *The Cargo ex Argos*, L. R., 5 P. C. 134, and *post*, Chap. VIII. НУТОНЕ-CA-TION.

(*m*) As to the custody and use of this document, see *ante*, p. 23.

(*n*) The M. S. Act, 1854, s. 50. See *R. v. Pixley*, 13 East, 91, and *R. v. Walsh*, 1 A. & E. 481, which are decisions upon somewhat similar provisions in the earlier acts.

(*o*) See the M. S. Act, 1854, ss. 149—

167. Under the earlier statutes, the master was bound to keep an account of the crew, containing numerous particulars, in a form sanctioned by the Board of Trade. By sect. 168 of the M. S. Act, 1854, the master of every foreign-going ship, the crew of which has been engaged before a shipping master, or, as they are now called, a mercantile marine office superintendent, must, before finally leaving the United Kingdom, sign and send to the nearest superintendent a full and accurate account, in a form sanctioned by the Board of Trade, of every change which has taken place in his crew. See Appendix, "Forms," 24*l*; and as to the lists of the crew which must be forwarded to the superintendents, see *post*, Chap. IV., CREW.

Charter-party.

THE CHARTER-PARTY (*p*).

Bills of lading and manifest.

THE BILLS OF LADING AND MANIFEST (*q*).

Log book.

THE LOG BOOK, or ship's journal, which should contain a minute account of the ship's course, with a short account of every event of any moment which occurs during the voyage. Formerly no particular form of log book was necessary, nor were its contents prescribed by any statute. By the Merchant Shipping Act, 1854, however, an official log, which may be either united with or kept distinct from the ordinary ship's log, must be kept according to the form sanctioned by the Board of Trade (*r*).

The master of every British sea-going ship must, upon her leaving any dock, wharf, port or harbour for the purpose of proceeding to sea, record her draught of water in the official log book (if any), and produce such record to any principal officer of Custom whenever required by him so to do, subject to a penalty not exceeding 20*l.* (*s*). He must also enter a statement as to the deck and load lines, which are provided for by the Merchant Shipping Act, 1876 (*t*).

In this log the master must make or cause to be made entries of the following matters (*u*):—

- (1.) Every legal conviction of any member of his crew, and the punishment inflicted.
- (2.) Every offence committed by any member of his crew for which it is intended to prosecute, or to enforce a forfeiture, or to exact a fine, together with a statement that the entry has been read over to the offender, and a statement of the reply (if any) made to the charge (*x*).
- (3.) Every offence for which punishment is inflicted on board, and the punishment inflicted.
- (4.) A statement of the conduct, character and qualifications

(*p*) See *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*q*) See *supra*, p. 133, and *post*, Chap. VI.

(*r*) The M. S. Act, 1854, s. 280, and Appendix, "Forms," No. 43. This log need not be kept by ships employed exclusively in trading between ports on the coasts of the United Kingdom, *ib.* The official log was first required by the Mercantile Marine Act, 13 & 14 Vict. c. 93; see ss. 85—93. Coasting

vessels must carry a CARGO BOOK. See *supra*, p. 133, n. (*z*).

(*s*) The M. S. Act, 1871, s. 5. The record of the draught of water must specify the extent of the ship's clear side in feet and inches. The M. S. Act, 1873, s. 4.

(*t*) The M. S. Act, 1876, s. 26.

(*u*) The M. S. Act, 1854, s. 281; The M. S. Act, 1867, s. 4; and the 37 & 38 Vict. c. 88, ss. 37, 54.

(*x*) The M. S. Act, 1854, ss. 244, 256.

of each of his crew, or a statement that he declines to give an opinion on such particulars.

- (5.) Every case of illness or injury happening to any member of the crew, with the nature thereof and the medical treatment adopted (if any).
- (6.) Every case of death happening on board, with the date of death, the surname, sex, age, rank, profession or occupation, nationality and last place of abode of the deceased, with the cause thereof (*y*).
- (7.) Every birth happening on board, with the date of birth, the name (if any) and sex of the infant, and the name and surname, rank, profession or occupation of the father, the name, surname and maiden name of the mother, and nationality and last place of abode of the father and mother (*y*).
- (8.) Every marriage taking place on board, with the names and ages of the parties (*z*).
- (9.) The name of every seaman or apprentice who ceases to be a member of the crew, otherwise than by death, with the place, time, manner and cause thereof.
- (10.) The amount of wages due to any seaman who enters her Majesty's service during the voyage.
- (11.) The wages due to any seaman or apprentice who dies during the voyage, and the gross amount of all deductions to be made therefrom.
- (12.) The sale of the effects of any seaman or apprentice who dies during the voyage, including a statement of each article sold and of the sum received for it.
- (13.) Every collision with any other ship, and the circumstances under which the same occurred.
- (14.) Every case of neglect or refusal to take lime or lemon juice under the provisions of the Merchant Shipping Act, 1867.

The entries must be signed by the master and by the mate, or some other of the crew, and every entry of illness, injury or death must be also signed by the surgeon or medical practitioner on board (if any); entries of wages due to or of the sale of the effects of seamen or apprentices who die must be signed by the

(*y*) These entries are made under the authority of the Board of Trade acting under the powers of the Registration of Births and Deaths Act, 1874 (37 & 38 Vict. c. 88, s. 37), which repeals

the provisions of the M. S. Act, 1854, as to such entries. See Appendix, "Forms," No. 43.

(*z*) As to marriages on board Queen's ships, see the 42 & 43 Vict. c. 29.

master and by the mate and some other member of the crew; and every entry of wages due to any seaman who enters the Queen's service must be signed by the master and by the seaman, or by the officer authorized to receive the seaman into such service (a).

All entries made in the official log, as directed by the act, are receivable in evidence in any proceeding in any court of justice, subject to all just exceptions (b).

The entries must be made as soon as possible after the occurrence to which they relate, and, if not made on the same day, they must be made and dated so as to show the date of the occurrence and of the entry respecting it; and in no case may any entry in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge be made more than twenty-four hours after her arrival (c). If the official log is not kept in the manner required by the act, or if any entry directed to be made in it is not made at the time and in the manner directed, the master for each offence incurs the specific penalty mentioned in the act, or where there is no specific penalty, a penalty not exceeding 5*l*. (d). Every person who makes or procures to be made, or assists in making any entry in an official log in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge more than twenty-four hours after such arrival, incurs a penalty not exceeding 30*l*. (d). Every person who wilfully destroys or mutilates, or renders illegible any entry in an official log, or who wilfully makes or procures to be made, or assists in making, any false or fraudulent entry or omission in such log, is guilty of a misdemeanor (e).

(a) The M. S. Act, 1854, s. 283. The M. S. Act, 1862, contains extended provisions with reference to the wages and effects of deceased seamen, and the wages of seamen who are lost with the ship to which they belong. See ss. 20, 21, and *post*, Chap. IV., CREW.

(b) The M. S. Act, 1854, s. 285. But a restrictive meaning must be put upon these words and similar words in other sections of the M. S. Acts. The log cannot be regarded as evidence against third parties of the facts stated in it. See *Norhard v. Pepper*, 17 C. B., N. S. 39; *The Little Lizzie*, L. R., 3 A. & E. 57. In *The Henry Coxon*, 3 P. D. 156, Sir Robert Phillimore refused to admit in a collision case entries as to

the circumstances of the collision made in the ship's log by the mate who had since died. The entry was not a contemporaneous entry, and was not shown to be confined to facts known to the mate of his own knowledge.

(c) *Ib.* s. 281.

(d) *Ib.* s. 284.

(e) *Ib.* As to the mode in which, and the time when the official log must be delivered up to the mercantile marine office superintendent at the end of the voyage, or upon the change of the ship's character, or upon her loss or abandonment, see ss. 286, 287, and *post*, p. 150, where the duties of the master, at the end of the voyage, are considered.

THE BILL OF HEALTH (*f*) is a document given to the master Bill of health. by the authorities of the port from which he comes, describing the sanitary state of the place: it may be a clean, suspected, or foul bill. The first is given where no disease of an infectious or contagious kind is known to exist; the second when, though no such disease has appeared, there is reason to fear it; and the last when such a disease actually exists at the time of the ship's departure (*g*).

The above documents are those which at all times form the usual papers of a merchant ship. In time of war, however, it is usual to carry in addition a PASSPORT, OR SEA LETTER, which Sea letter. is a permission from the neutral state to proceed with the voyage; and if the vessel be insured as neutral, the master is bound to be provided, in addition, with all the other documents which may at the time be necessary to evidence her neutrality (*h*). Formerly ships sailing by way of Gibraltar were required by statute to be provided with a Mediterranean pass (*i*). This was an indented paper granted by the government of Algiers to protect British vessels from cruisers belonging to that state. As the present condition of Algeria renders this pass no longer necessary, it is no longer required (*k*).

The master is bound, on the requisition of any naval officer Production of ship's papers. on full pay, officer of the Board of Trade, chief officer of Customs, mercantile marine office superintendent, British consular officer, registrar-general of seamen or his assistant, to produce his official log and his other books and papers, and a list of all persons on board, and to allow copies to be taken of them. He must also allow the crew to be mustered on any such requisition (*l*).

The master must also, whenever any ship (except ships whose business for the time being is to carry passengers) arrives

(*f*) A form of a Clean Bill of Health is given in the Appendix, "Forms," No. 48. As to the power of British consular officers to administer oaths in cases of quarantine, see the 6 Geo. 4, c. 78, s. 28; Supp. App. p. 181. As to fees, see Appendix, "Orders in Council," p. 15.

(*g*) See the 6 Geo. 4, c. 78, and Burn's Justice, by Chitty, vol. 5, tit. Plague and Quarantine. Where by a charter-party the owner covenanted that the vessel should be sufficiently furnished with everything necessary and needful

for the voyage, he was held to be liable for not having on board a bill of health, the absence of which caused delay. *Leay v. Costerton*, 4 Camp. 389.

(*h*) See *post*, Chap. VII., INSURANCE.

(*i*) See the 8 & 9 Vict. c. 89, s. 6, now repealed, and the earlier Registry Acts. See also 1 Beawes, Lex Merc. 394.

(*k*) The 12 & 13 Vict. c. 90, s. 28.

(*l*) The M. S. Act, 1854, s. 13. The shipping masters are now called mercantile marine office superintendents. See the M. S. Act, 1862, s. 15.

at a foreign port where there is a British consular officer, or at any port in any British possession, and remains there forty-eight hours, deliver to the consular or Customs officer the agreement and the indentures and assignments of apprentices, to be kept by this officer during the ship's stay in the port (*m*). And if during the progress of any voyage the master is superseded, or for any other reason quits the ship, he must, subject to a penalty not exceeding 100%, deliver over to his successor all the documents in his custody relating to the navigation of the ship and to the crew, and a list of these documents must be entered by the new master in the official log (*n*).

FLAGS.

We have already noticed what ships may carry the British flag, and the penalty which attaches to the improper use of it (*o*).

Signals of
distress, &c.,
for pilots.

By the Merchant Shipping Act Amendment Act, 1873, sects. 18 and 19, provisions are made as to signals of distress and for a pilot. These are specified in the 1st and 2nd schedules of the act (*p*).

By sect. 18 any master who uses or displays, or causes or permits any person under his authority to use or display, any of the signals for distress, except in the case of a vessel being in distress, is liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of such signal having been supposed to be a signal of distress, and this may, without prejudice to any other remedy, be recovered in the same manner in which salvage is recoverable.

By sect. 19 any master of a vessel who uses or displays, or causes or permits any person under his authority to use or display, any of the pilot signals for any other purpose than that of summoning a pilot, or uses or causes or permits any person

(*m*) The M. S. Act, 1854, s. 279.

(*n*) *Ib.* s. 259.

(*o*) *Ante*, p. 27. The M. S. Act, 1854, s. 105. See also the 24 Geo. 2, c. 47, s. 24, the 6 Geo. 4, c. 108, s. 15, and the 8 & 9 Vict. c. 87, s. 10, now repealed. It was held, that, apart from this statute, the Court of Admiralty would grant a warrant of arrest against a master for wearing the colours of a Queen's ship, as for a contempt. *The Minerva*, 3 Rob. 34. See as to the effect of the earlier statutes and pro-

clamations as to flags, *The Minerva*, *R. v. Miller*, 1 Hagg. 197; *R. v. Benson*, 3 Hagg. 96. In these cases a warrant of arrest is granted on affidavits. *The Queen* (in her office of Admiralty) *v. Ewen*, 2 Jur., N. S. 454. Merchant ships commanded by an officer of the Naval Reserve, and of which the crew include ten Naval Reserve men, may obtain, through the Board of Trade, permission to wear the blue ensign.

(*p*) See Appendix, p. cccxv.

under his authority to use any other signal for a pilot, incurs a penalty not exceeding 20*l*.

By sect. 20 the Queen may, by Order in Council, repeal or alter the rules as to signals contained in the schedules to the act, or make new rules in addition or in substitution. Private code.

By sect. 21 any shipowner who is desirous of using, for the purposes of a private code, rockets, lights, or other similar signals, may register them with the Board of Trade, and the Board is to give public notice of them for preventing such signals from being mistaken for signals of distress or for pilots. The Board may refuse to register any signals which in their opinion cannot easily be distinguished from signals of distress or for pilots. When any signal has been registered, the use or display of it by any person acting under the authority of the shipowner in whose name it is registered will not subject any person to penalties or liabilities imposed upon persons using or displaying signals improperly (*g*).

Masters of vessels liable to quarantine are required by the 8th section of the 6 Geo. 4, c. 78, to exhibit signals on meeting other vessels at sea, or being within two leagues of the United Kingdom (*r*). Quarantine signals.

It is proper here to mention the offence of barratry, which, although common to both masters and other mariners, is of more especial importance as regards the former. The word "barratry" is derived from the Italian *barratrare*, to cheat (*s*). Any illegal, fraudulent or knavish conduct of the master or mariners, by which the freighters or owners are injured, is, by our law, barratry (*t*). This offence may be considered, first, as an act of misfeasance or wilful neglect against the owner, recognized by the common and maritime law; and, secondly, as subjecting the offender to punishments imposed by statute. BARRATRY.

In order to constitute barratry, the act must generally be done fraudulently, and with a criminal intent; and it is not sufficient that it is merely against the interest of the owner (*u*).

(*g*) For a list of such signals, see Appendix, "Forms," No. 50.

(*r*) See Supp. App., p. 134.

(*s*) Ducange, in his Glossary, gives a wider sense to the word "*Barrataria*." He defines it, "*fraus, dolus, qui fit in contractibus et venditionibus*." See other definitions in the judgment in *The Patapasco Insurance Company v.*

Coulter, 3 Peter's (Amer.), 230.

(*t*) *Knight v. Cambridge*, 2 Lord Raym. 1349; *S.C.*, 1 Str. 581; *Stamma v. Brown*, 2 *ib.* 1173; *Elton v. Brogden*, *ib.* 1264; *Lockyer v. Offley*, 1 T. R. 252.

(*u*) *Knight v. Cambridge*, 2 Lord Raym. 1349; *Stamma v. Brown*, 2 Str. 1173, and as cited by Lawrence, J., 7 T. R. 508; *Phyn v. Royal Exchange*

Thus, the neglect to obey a statutory rule as to steering, is not barratry (*x*). It is not, however, necessary that the act should have been done with intent to defraud the owner, if it be illegal and wilful. Thus where a master traded with an enemy, whereby the ship was condemned, this was held to amount to barratry although his orders were to make the best purchases, and the trading would have been beneficial to his owner, had the vessel not been seized (*y*). So where Polynesian labourers were carried contrary to statute, whereby the ship was forfeited (*z*).

If the fraudulent intent be once shown to have existed, any act by which the owner's interest is prejudiced, although otherwise of slight moment, is barratrous, as, for example, even the dropping of an anchor (*a*). The following are also instances of acts or omissions which (the intent and effect having been proved) have been held to be barratry. The neglect to pay port dues (*b*); a wilful deviation for the captain's own convenience (*c*); cruising for prizes without orders from the owners (*d*); smuggling (*e*), or negligently allowing the crew to smuggle (*f*); criminal delay (*g*); running away with the ship and selling her, and part of the cargo (*h*); and breaking through a blockade (*i*).

Where the owner is a consenting party to the master's act, he cannot set it up as barratry (*k*).

The master, if also sole owner, cannot commit barratry within the meaning which our law has attached to the word (*l*), but barratry may be committed by a master who is also part owner (*m*). So there may be barratry with the privity of the

Assurance Company, 7 T. R. 505; and see Lord Ellenborough's judgment in *Earle v. Rowcroft*, 8 East, 132. By the law of France, and of some other foreign countries, barratry has a more extensive signification. It comprehends any fault on the part of the master or mariners, whether fraudulent or merely negligent, by which the owner is injured. Pothier, *Traité des Assurances*, chap. 1, s. 65; Valin, liv. 3, tit. 6, art. 28; Emérigon, *Traité des Assur.* c. 12, s. 3. See also, as to the sense in which it is used in modern French law, *The Encyclopédie du Droit*, tit. *Baratarie du Patron*.

(*x*) *Grill v. General Iron Screw Collier Company*, L. R., 1 C. P. 600; 3 C. P. 476. See the definitions of Barratry, cited in the argument.

(*y*) *Earle v. Rowcroft*, 8 East, 126.

(*z*) *The Australasian Insurance Company v. Jackson*, P. C., 33 L. J., N. S. 286.

(*a*) *Ross v. Hunter*, 4 T. R. 33.

(*b*) *Knight v. Cambridge*, as cited by Lord Mansfield, Cowp. 153.

(*c*) *Vallejo v. Wheeler*, Cowp. 153; see also *Hibbert v. Martin*, 1 Camp. 538; *Hucks v. Thornton*, Holt, 30.

(*d*) *Moss v. Byrom*, 6 T. R. 379.

(*e*) *Lockyer v. Offley*, 1 T. R. 252.

(*f*) *Pipon v. Cope*, 1 Camp. 434.

(*g*) *Roscow v. Corson*, 8 Taunt. 684.

(*h*) *Ib.*; *Dixon v. Reid*, 5 B. & A. 597; see also *Toulmin v. Anderson*, 1 Taunt. 227.

(*i*) *Goldschmidt v. Whitmore*, 3 Taunt. 508.

(*k*) Per Lord Mansfield, *Vallejo v. Wheeler*, Cowp. 153; *Ross v. Hunter*, 4 T. R. 33; *Everth v. Hannam*, 6 Taunt. 375.

(*l*) *Nutt v. Bordieu*, 1 T. R. 323.

(*m*) *Jones v. Nicholson*, 10 Exch. 28. See the authorities cited in this case as to barratry generally.

freighter against the owner (*n*); but it can be committed only against the actual owner, or against one who is owner *pro hac vice*; as, for instance, one to whom the ship is *let* by charter-party (*o*), in which case the freighter stands in this respect in the position of owner, and the original owner may be guilty of barratry against him (*p*).

The legislature has treated as crimes, and visited by statutory punishment, the more malicious and mischievous acts in the nature of barratry. The first and most serious of these offences consists in the maliciously setting fire to, destroying, or damaging a vessel. This has been governed by various statutes from time to time (*q*). The acts now in force are as follow :—

By the 24 & 25 Vict. c. 100, s. 13, it is enacted that, if any person shall set fire to any ship (*r*) or any part thereof, or any goods or chattels therein, or shall cast away any ship *with intent to commit murder*, he shall be guilty of felony, and liable to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Statutory offences in the nature of barratry.

By 24 & 25 Vict. c. 97, s. 42, to unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether complete or in an unfinished state, is guilty of felony, and liable to penal servitude for three (now five, 27 & 28 Vict. c. 47, s. 2) years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and, if a male under sixteen, with or without whipping. Sect. 46 contains a similar provision as to damaging ships by gunpowder or any other explosive substance.

Other offences in the nature of barratry are those of turning pirate, running away with the ship or cargo, or revolting against the master. By the 11 & 12 Will. 3, c. 7 (*s*), if the master or any

(*n*) *Boufflower v. Wilmer*, 2 Selw. N. P. 978, 9th ed.

(*o*) *Vallejo v. Wheeler*, Cowp. 153.

(*p*) *Soares v. Thornton*, 7 Taunt. 627.

(*q*) See the 7 & 8 Geo. 4, c. 30; the 7 W. 4 & 1 Vict. c. 89 (both repealed by the 24 & 25 Vict. c. 95). The earlier Acts are collected and reviewed in *Abbott on Shipping*.

(*r*) In *E. v. Bowyer*, 4 C. & P. 559, Patteson, J., expressed an opinion that a pleasure boat eighteen feet long was within an earlier Act. See also *R. v. Smith*, *ib.* 569, where a similar ques-

tion arose as to a barge, *R. v. Philp*, 1 Moo. C. C. 263, and *R. v. Neville*, *ib.* 458. The offence of destroying a vessel may be committed by one of the part owners. *Reg. v. Wallace*, 1 Car. & Marsh, 200.

(*s*) The 11 & 12 Will. 3, c. 7, s. 9. This stat. is in part repealed by the Stat. Law Revision Act, 1867, but s. 9 remains. The punishments imposed by this and subsequent acts relating to piracy, are modified by the 7 Will. 4 & 1 Vict. c. 88.

seaman, in any place where the admiral has jurisdiction, betrays his trust, and turns pirate, enemy or rebel, or runs away with the ship, or any barge, boat, ordnance, ammunition or goods, or yields them up voluntarily to any pirate, or brings seducing messages from any pirate, enemy or rebel, or consults, combines or confederates with, or attempts or endeavours to corrupt any master, officer or mariner to commit such an offence, or lays violent hands on his commander, or hinders him from fighting in defence of his ship and goods, or confines his master, or makes or endeavours to make a revolt on board, he is declared to be a pirate, felon and robber.

Jurisdiction
of British
courts.

It is provided, by the 267th section of the Merchant Shipping Act, 1854, that all offences against property or person committed in or at any place, either afloat or ashore, out of her Majesty's dominions, by any master, seaman, or apprentice who at the time when the offence was committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively and be tried and determined as if such offences had been committed within the jurisdiction of the admiralty of England. And the Merchant Shipping Act, 1867 (sect. 11), provides that if any British subject commits any crime or offence on board any British ship, *or on board any foreign ship to which he does not belong*, any court of justice in her Majesty's dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid (*t*).

The Territorial Waters Jurisdiction Act, 1878, provides (sect. 2) that an offence committed by a person, whether he is or is not a subject of the Queen, on the open sea, within the territorial waters of her Majesty's dominions (*u*), is an offence within the jurisdiction of the admiralty of England and Ireland.

DUTIES AFTER
THE VOYAGE.

When the voyage is ended, the master should make the earliest possible report to his owner, and should take the ship, according to the orders he may then or previously have received, to the place where she is to discharge her cargo.

(*t*) See the 41 & 42 Vict. c. 67, s. 3. subsequently to the decision in *Reg. v. Keyn*, 2 Ex. D. 63.
(*u*) The 41 & 42 Vict. c. 73, Appendix, p. cclxviii. This Act was passed sub-

The master must conform to the quarantine regulations. If QUARANTINE.
the ship has, with or without a clean bill of health, come from either the Mediterranean, the Baltic, the Black Sea, the Sea of Azof, or the Sea of Marmora, or from or having touched at any place in, or the passage from which is through, any of the said seas, or from any other place from which her Majesty shall declare by proclamation or order in council that any dangerous infectious disease prevails, or from any port or place whatever, if she arrives under any suspicious circumstances, as to infection (sect. 6), the master must, upon arrival off the coast of the United Kingdom, deliver to the pilot who shall go on board an account in writing of the name of the place at which his ship loaded and the names of all the places at which he touched on the voyage; and upon entering or attempting to enter any port, and being interrogated by any quarantine officer or officer of customs, or coastguard acting in that behalf, he must bring to his vessel, deliver on demand his bill of health and other ship's papers, and give a true answer in writing or otherwise, and upon oath or not upon oath, as to the questions put, as shall be required by the quarantine officer for the purpose of ascertaining whether his vessel is or is not liable to quarantine (r). If his vessel is liable to quarantine, the master must obey the directions of the quarantine officer, and not permit any of his crew or passengers to go on shore during the quarantine (v).

The 234th section of the Customs Laws Consolidation Act (39 & 40 Vict. c. 36) provides that the Queen in council, or the Privy Council, may require that no person on board any ship coming to the United Kingdom from, or having touched at any place out of the United Kingdom abroad, where they have

(r) For the form of the Quarantine Certificate, which is issued in all cases where the answers to the boarding officer are satisfactory, and the ship is found not liable to quarantine, see Appendix, "Forms," No. 47.

(v) See the 6 Geo. 4, c. 78, Supp. App., p. 181, and the 38 & 39 Vict. c. 55, s. 343, and Shed. V. p. III. reviving the 29 & 30 Vict. c. 90, ss. 51, 52; and Appendix, Orders in Council, p. 84. By the 110th section of the Public Health Act, 1875, 38 & 39 Vict. c. 55 (see Supp. Appendix, p. 163), the provisions of the Act relating to nuisances are made applicable to ships lying in any river either within or without the jurisdic-

tion of the local sanitary authority. The Act (s. 287) enables the Local Government Board to constitute a local sanitary authority or port sanitary authority. By the 160th section the Act gives the Local Government Board power from time to time to make regulations with a view to preventing the spread of cholera and such other diseases on the seas, rivers, and waters of the United Kingdom, and on the high seas within three miles of the coast. The regulations now in force, which were issued under the Act (29 & 30 Vict. c. 90) previously in force, are set out in the Appendix, "Forms," No. 51.

reason to apprehend that yellow fever or any highly infectious disorder prevails, shall quit such ship before examination by the proper officer of Customs as to the state of health of the persons on board, and this whether or not it is found expedient to place the ship under quarantine (*x*). In case the above provisions are not complied with, every person quitting the vessel is liable to a penalty. The section also provides that the master of any vessel to which the section applies shall hoist and continue such signal as the Order in Council or Privy Council shall direct (*y*).

Documents to be delivered to the mercantile marine office superintendent.

The master must also, if his ship be a "foreign going ship," deliver to the mercantile marine office superintendent within forty-eight hours of the ship's arrival at her final port of destination in the United Kingdom, or upon the discharge of the crew, whichever first happens, the agreement with the crew (*z*). He is also bound, whether his ship be a "foreign going" or a "home trade" ship, to make out, whenever the crew is discharged in the United Kingdom, a list, in a form sanctioned by the Board of Trade, containing particulars as to the tonnage of the ship, the voyage, the names, ages, place of birth and qualities of the crew, and as to the wages due to, and the effects belonging to, any of the crew that have died. These lists must also mention any marriages, and any injuries to the crew, which have occurred on board (*a*). In the case of home trade ships, they must be transmitted half yearly to a superintendent of a mercantile marine office, but in that of foreign going ships, they must be delivered to the superintendent before whom the crew is discharged, within forty-eight hours of the ship's arrival, or on the discharge of the crew, whichever happens first (*b*).

The 37th section of the Births and Deaths Registration Act,

(*x*) See the 6 Geo. 4, c. 78, s. 3.

(*y*) In default of payment of the penalty, offenders may be imprisoned for six months. The Privy Council have recently made an order under this section with regard to certain ports in the West Indies. See Appendix, Orders in Council, p. 87.

(*z*) The M. S. Act, 1854, s. 161. If the ship be a home-trade ship the master must comply with the provisions of the M. S. Act, 1854, s. 162. The ship cannot be cleared inwards without the production of a certificate from the superintendent that these provisions have been complied with. For the

forms of certificates, see Appendix, "Forms," Nos. 22A, 27A.

(*a*) The M. S. Act, 1854, s. 273. So much of this section as related to births and deaths is repealed by the Births and Death Registration Act, 1874 (37 & 38 Vict. c. 88, s. 57). Where agreements with the crew have been entered into in the form sanctioned by the Board of Trade, the lists required by the unpealed portion of the section are incorporated with the agreements. See Appendix, "Forms," No. 24, 25, 25A, 25B, 25C.

(*b*) The M. S. Act, 1854, ss. 274, 275.

1874, provides that the master of every British ship shall, after the birth of a child or the death of a person on board his ship, record in his log-book or otherwise the fact of such birth or death, and shall, upon the arrival of the ship at any port in the United Kingdom, or at such other time or place as the Board of Trade may direct, deliver, in such form and manner as the Board of Trade may direct, a return of the facts so recorded to the Registrar-General of Shipping and Seamen (c).

In the case of foreign going ships the master must also, within the last-mentioned periods, deliver to the superintendent before whom the crew is discharged, the official log. In the case of home trade ships, this log must be transmitted half-yearly to a mercantile marine office superintendent (d).

The master is also bound to conform to all the regulations which are contained in the Customs Consolidation Act, 1876, the 39 & 40 Vict. c. 36, and the Customs and Inland Revenue Acts, 1878 and 1879 (41 Vict. c. 15; 42 & 43 Vict. c. 21). The entry of the cargo and payment of the duties on it, which attach upon the merchant or his agent, need not here be mentioned, but the following requirements of the statute fall within the scope of the master's employment (e).

Customs
laws.

The ship must be brought quickly to the proper place of mooring or unloading, without touching at any other place. The master must bring-to at the stations appointed for the boarding of the officers of Customs, and he must provide sufficient room and shelter under the deck for any of these officers who may be stationed on board (f). The officers of Customs must be allowed to board the ship and to stay on board until all the goods have been delivered, and they must be permitted to have free access to all parts of the ship, and to lock up, mark or secure any of the goods (g). Any goods found concealed on board are liable to forfeiture, and the master is liable to heavy penalties if any lock, mark, or seal placed by the Custom house officers is wilfully opened, altered, or broken, or if any goods are secretly conveyed

(c) The 37 & 38 Vict. c. 88, s. 37, and Sched. IV. (Appendix, p. cccxxix.). The directions of the Board of Trade are printed in the Official Log. See Appendix, "Forms," No. 43.

(d) The M. S. Act, 1854, s. 286. As to the duty of the master to deliver the passenger lists required by the Passengers Act, 1855, s. 100, see *post*, Chap. XI., PASSENGERS.

(e) See also the M. S. Act, 1862, which contains provisions as to the delivery of goods and lien for freight. See ss. 66—78.

(f) The 39 & 40 Vict. c. 36, s. 46.

(g) Any unauthorised person boarding a ship before the actual arrival at her place of discharge without the consent of the master is liable to a penalty. The M. S. Act, 1854, s. 237. *Attwood v. Case*, 1 Q. B. D. 134.

away, or the hatchways are opened after having been fastened down (*f*).

Report and
entry.

No goods (except diamonds, bullion, lobsters and fresh fish of British taking, and in British ships) may be landed without report or entry; nor at any hours except those sanctioned by the Commissioners of Customs; nor may any goods be unshipped or landed except in the presence of a custom house officer within the prescribed hours, and at a duly appointed place for the landing of goods (*g*). The master must also whenever any ship, whether laden or in ballast, arrives from parts beyond the seas, make due report of such ship to the collector or other officer within twenty-four hours (*h*), and before bulk is broken, according to the requirements of the statute. The report must contain the particulars and description of the goods, in a form given by the act, and must also mention among other details the name and tonnage of the ship, the number of the crew, and the number of alien passengers on board (*i*), and the master must state that he has not broken bulk since the ship's departure from the last foreign place of loading (*k*).

By the 3 & 4 Vict. c. 96, the master is not allowed to report his ship until he has signed a declaration that he has delivered at the post office all letters not exempted (*l*).

At the time when the report is made the master must deliver to the officers of customs, if required, the bills of lading or copies of them, and must answer any questions put to him as to the ship, cargo, crew, or voyage; and he is liable to a heavy penalty if bulk is broken, after the arrival of the ship within four leagues of the coast, or if any alteration is made in the stowage of the cargo so as to facilitate the unloading of any part of it, or if any part of it is staved, destroyed, or thrown overboard, or any package is opened, unless this is accounted for to the satisfaction of the Commissioners of Customs (*m*).

(*f*) The 39 & 40 Vict. c. 36, s. 47.

(*g*) *Ib.* s. 48.

(*h*) In the case of ships examined under the Quarantine regulations report will not be received unless upon production of the Quarantine certificate. See *supra*, p. 149, n. (*r*). See also Parl. Papers, Sess. 1879, No. C 2262, p. 73.

(*i*) See also the Alien Registration Act, 1836 (6 & 7 Will. 4, c. 11), s. 8, Supp. App., p. 138, which provides that the masters of vessels coming from foreign ports shall immediately on arrival declare under a penalty what

aliens are on board or have landed from their vessels.

(*k*) The 39 & 40 Vict. c. 36, s. 60. The 48th section of the 10 Vict. c. 27 provides that in certain cases report may be refused unless the harbour, &c. rates due in respect of the ship are paid or secured. See *supra*, p. 134.

(*l*) The 3 & 4 Vict. c. 96, s. 36, Supp. App., p. 140. See also the 1 Vict. c. 36, s. 6, *ib.* p. 139.

(*m*) The 39 & 40 Vict. c. 36, s. 53. As to the provisions of the Customs

By the Merchant Shipping Act, 1862, s. 67, if the owner of goods imported fails to enter or land them, the shipowner may do so, subject to certain conditions (*n*).

When the master has complied with the Customs regulations his remaining duties are to obey the regulations of the harbour or port in which his vessel may be (*o*), and to deliver the cargo to the consignee named in the bills of lading, or to his agent, on payment of the freight and of any other charges which he is entitled to make (*p*). The meaning of the words "on payment of freight" in bills of lading and charter-parties, is not that freight is to be paid either immediately before or immediately after the delivery of the cargo, but that the two acts are to be concurrent, and the master may demand payment of the freight each day on the cargo delivered (*q*). Delivery of cargo.

In a case where bags of rye meal were shipped on board a vessel of which the defendant was the master, some weighed much more than the others, but they were mixed together, and the master knew nothing of their relative weights. The master signed two bills of lading, one for 1,209 bags, and the other for 467 bags. The latter bill was described to be for 467 bags, gross 35 tons, 9 cwt., and at the foot of it were the words, "contents unknown, and not responsible for weight" (*r*). The bills of lading did not identify the bags, which were all marked alike,

Acts with respect to vessels in the coasting trade, see *supra*, p. 133, n. (c). And as to where a clearance inward or a transire may be refused, see *supra*, p. 129; and the M. S. Act, 1854, s. 226.

(*n*) See *Beresford v. Montgomerie*, 17 C. B., N. S. 379; *Wilson v. London, Italian and African Steam Navigation Company*, L. R., 1 C. P. 61.

(*o*) See *ante*, p. 128. The Dockyard Ports Regulation Act, 1865 (28 & 29 Vict. c. 125, s. 6), enables the Queen in Council to make regulations in relation to any dockyard port. See Appendix, p. cclx. For a list of the Orders in Council made under this act, see Supp. Appendix, p. 48.

(*p*) *Post*, Chap. VI., CONTRACT OF AFFREIGHTMENT. An order by the owner of a ship to a house at a foreign port to collect the freight has been held to take the matter out of the hands of the master. See *The Edmond*, Lush. 57. With respect to the duty of the master to obey the orders of the consignee as to the place of delivery, see *The Felix*, L. R., 2 A. & E. 273.

(*q*) *Black v. Rose*, 2 Moore P. C. C. (N. S.) 277; *Paynter v. James*, L. R., 2 C. P. 348. See also the M. S. Act, 1862, c. 63, s. 67, explained by *Wilson v. Italian Steam Navigation Company*, L. R., 1 C. P. 61. Where a bill of lading provided that if the consignee was not ready to receive goods as soon as the ship was ready to unload the master was to land and warehouse them at the expense of the consignee, it was held that the contract was divisible, and that even if the consignee was ready to receive only part of the goods at the exact moment the ship was ready to discharge them, yet the master was bound to deliver to him the remainder as soon as ever the consignee was ready to receive them. See also *Mors le Blanch v. Wilson*, L. R., 8 C. P. 227.

(*r*) In *Lebeau v. The General Steam Navigation Company*, L. R., 8 C. P. 88, it was held that the effect of these words is to exclude altogether the description of the goods in the bill of lading. See also *The Peter der Grouse*, 1 P. D. 414.

nor did they indicate that the bags were for two different consignees. The master delivered by mistake to the consignee of the 467 bags, which should have been of the larger weight, several bags which were only of the smaller weight. Under these circumstances, the Court of Exchequer was divided in opinion as to the master's liability. The Exchequer Chamber held that the master was responsible for the non-delivery of the bags of the larger weight (s). It has been held in the Court of Admiralty, that if bills of lading are presented to the master by two different holders, and he delivers the goods to one, the other acquires no right of action against him by reason of this delivery, for he is not bound to ascertain which of the two holders has the better right (t). If freight for the whole voyage is offered at an intermediate port, where the ship is detained by no fault of the merchant, and there is no prospect of the ship being able to prosecute her voyage within a reasonable time, the master is not justified in refusing to unload the cargo (u).

Fifthly, as to the liability of the master, and that of the owners and of the freighters, arising out of his acts.

PERSONAL
LIABILITY ON
CONTRACTS.

As the master is not merely an ordinary agent, but to some extent, and for some purposes, the owner of the ship for the time being, his acts not only bind his principal, as those of an ordinary agent, but he is personally bound by them, unless he expressly confines the credit to the owner, and excludes any liability on his own part (x). He is also usually liable for all acts of negligence or misfeasance on the part of the crew, by which the cargo or the property of others is injured (y). But

(s) *Bradley v. Dunipace*, 7 H. & N. 200; *S. C.*, in Error, 1 H. & C. 521. In the Court below, Pollock, C. B., and Wilde, B., held that the master was not liable. Bramwell and Channell, BB., were of a contrary opinion. When the consignment was specified by weight in the body of a bill of lading, which afterwards contained the printed form "weight, contents and value unknown," the Court held that the two statements must be read together, and meant that the person who signed the bill had no actual knowledge of the real weight of the goods; but inserted in the bill the weight that he was told by the skipper, and calculated the freight upon it. *Jessel v. Bath*, L. R., 2 Ex. 267. See also *Blanchet v. Powell's Llantovit Collieries Company*, L. R., 9 Ex. 74.

(t) *The Tigris*, Br. & L. 38.

(u) *The Patria*, L. R., 3 A. & E. 436.

(x) *Garnam v. Bennett*, 2 Str. 816; *Hoskins v. Stayton*, Cas. temp. Hardwicke, 376; *Story on Agency*, s. 116; *Essery v. Cobb*, 5 C. & P. 358.

(y) *Molloy*, B. 2, c. 3, s. 13. Where a master (an infant) contracted to bring goods to England, but did not deliver them, it was held that he was liable in the Admiralty Court notwithstanding his infancy, the suit being in the nature of detinue or trover at common law. 1 Roll. Abr. 530, *Furnes v. Smith*. In *Michell v. Brown*, 28 L. J., M. C. 53, it was held, that the owner of a vessel might be convicted of throwing rubbish into a navigable river contrary to the 54 Geo. 3, c. 159, s. 11, although he was not on board when the act was done.

he is not liable for trespasses committed by them wilfully, or for acts done beyond the scope of their ordinary employment (z); nor does the ordinary rule with reference to the master's liability apply to the captain of a Queen's ship, who has no power of selecting his officers and crew, and who could not, therefore, in fairness be made answerable for those whom he has not chosen (a). We have seen (b) that the clauses of the Merchant Shipping Act, 1854, and the Amendment Act of 1862, which limit the liability of owners, do not apply to a case where a master who is also part owner has by his default contributed to the damage (c).

The master, under the general authority which he possesses, may do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged (d). And contracts entered into by him relative to her usual employment are binding on the owner (e). Where, however, goods are shipped under a charter, the master cannot cancel it and enter into a new one, and should he do so the original charter will still be binding as between the owners and consignees of the cargo (f). The implied authority of the master does not, however, usually exist in cases in which the owner can himself personally interfere; as, for instance, when the ship is in a port where the owner

POWER TO
BIND THE
OWNERS.

(z) *Boucher v. Noidstrom*, 1 Taunt. 568.

(a) *Nicholson v. Mounsey*, 15 East, 384.

(b) *Ante*, p. 81, n. (p). See the M. S. Act, 1854, ss. 503, 516; and the M. S. Act, 1862, s. 54.

(c) In an old case, where a master was joined as a defendant in an action against the owners, it was held that he was entitled to the benefit of the protection which his co-defendants claimed because the damages awarded must have been joint; *Wilson v. Dickson*, 2 B. & A. 2. But now, since the Judicature Acts, no such technical rule can prevail.

(d) *Per* Lord Abinger, in *Arthur v. Barton*, 6 M. & W. 138. This authority is derived from and governed by the municipal law of the country to which the ship belongs. *Lloyd v. Guibert*, L. R., 1 Q. B. 115; *The Karnak*, L. R., 2 P. C. 505. As to the authority of a master to render salvage service, see *The Thetis*, L. R., 2 A. & E. 365.

(e) *Boson v. Sanford*, Carth. 58; *Ellis v. Turner*, 8 T. R. 531; *Speering v. Degrave*, 2 Vern. 643; *The Messageries*

Impériales v. Baines, 11 W. R. 322. Where a vessel under charter-party was put up as a general ship by the master who signed bills of lading, it was held that the owners were bound by them. *The Figlia Maggiore*, L. R., 2 A. & E. 106. See also as to the authority of the master to settle claims for freight and demurrage, *Alexander v. Dowie*, 1 H. & N. 152. Where the master of a ship signs a bill of lading in his own name and is sued upon it, and judgment is obtained against him though without satisfaction, an action will not lie against the owner of the ship upon the same bill of lading. *Priestly v. Fernie*, 3 H. & C. 977. As to the authority of master where the owner is changed during the voyage, see *Mercantile and Exchange Bank v. Gladstone*, L. R., 3 Ex. 233.

(f) *Pearson v. Goschen*, 17 C. B., N. S., 352. See also *Thomas v. Lewis*, 4 Ex. Div. 18. If, however, at a foreign port the agent of the charterer refuses to take a full cargo, the master may fill his ship, signing bill of lading for the best freight he can get. *Pearson v. Goschen*, *ubi supra*.

resides, or at which he has beforehand appointed an agent (g). The master may bind the owners for repairs necessary for the prosecution of the voyage, and for money borrowed and employed for this purpose, and these powers are not confined to cases arising abroad, but exist also in a port in England, when the owners have no resident agent there (h). And in a modern case where a master borrowed a small sum of money at an English port to purchase provisions necessary for the use of the ship, the Court held, that the jury was justified in inferring that there was a reasonable necessity for this act, although there was no proof that the goods could not have been obtained on credit, and the owner lived within one day's post (i). It is usually otherwise where the owner's residence is so little distant from the port that the master may readily communicate with him (k). But in all these cases the authority of the master is confined to such outlay as is immediately necessary for the purpose of bringing the ship to her destination; therefore, although he may borrow money where ready money is necessary, that is to say, where certain payments must be made in the course of the voyage for which credit is never given, he may not borrow to pay for work previously done on credit. Where a master borrowed money to pay for repairs and towage already done, it was held that the owner was not liable, although he might have been liable upon the original contract under which the repairs and towage were done (l).

An owner who has become owner since the ship sailed, and who has not in any way recognized the agency of the master, is not usually bound as such, by contracts for necessaries made by

(g) *Gunn v. Roberts*, L. R., 9 C. P. 331. It was held in this case that a ship chandler, who in ignorance of there being an agent at the port, furnishes goods or advances money for the ship's use upon an order given by the master without the owner's authority, cannot recover the price of the goods or the amount of the loan from the owner if at the time of supplying the goods or advancing the money he had the means of knowing that an agent, able and willing to furnish what was requisite for the ship, had been appointed by the owner to act at the foreign port.

(h) *Cary v. White*, 5 Bro. P. C. 325; *Robinson v. Lyall*, 7 Price, 592; *Arthur v. Barton*, 6 M. & W. 138; *Johns v.*

Simons, 2 Q. B. 424; *The Great Eastern*, L. R., 2 A. & E. 88. By 19 & 20 Vict. c. 97, s. 8, all ports within Great Britain and Ireland, the Channel Islands and the islands adjacent, if part of the Queen's dominions, are to be deemed home ports in relation to the rights and remedies of persons having claims for repairs done or supplies furnished to ships.

(i) *Edwards v. Havill*, 14 C. B. 107.

(k) *Stonehouse v. Gent*, 2 Q. B. 431, note.

(l) *Beldon v. Campbell*, 6 Exch. 886, where see the observations of Martin, B., on *Robinson v. Lyall*, 7 Price, 592. And see *Strickland v. Neilson*, 7 Sess. Cas. (3rd Series) 400.

the master abroad (*m*). But where necessities have been supplied in an English port to a foreign ship a liability for the supply of necessities follows the ship into the hands of an innocent purchaser; and it makes no difference that the transferor is a foreigner resident abroad and the purchaser a British resident (*n*).

It is doubtful whether the master has authority to bind the owner by stipulations in a charter-party with respect to advances to be made to the master by the charterer against the freight (*o*).

The term "necessaries," in cases of this kind, means such things as are fit and proper for the ship upon her voyage (*p*). Where the master obtains credit, or borrows money to repair or victual the ship, the proof of the necessity for so doing, and of the proper application of the money, rests with the person who gives such credit or lends the money (*q*). If there was no occasion for it, the master alone is debtor, and not the owners (*r*). In a suit for disbursements in the Admiralty Court, it was held that a master was entitled to charge against the owner the expense of defending himself at a foreign port against a charge of murder brought by two of the crew in revenge for his having punished them, and also the amount of a recognizance to prosecute them for perjury, which he had forfeited rather than detain his ship (*s*). The master has no power, however, to bind his owners in respect of matters connected with the voyage but not necessary for its prosecution. Therefore, where disabled sailors had been landed, and there was no probability that they would be able to return to the ship and resume their duties, it was held

(*m*) *Mackenzie v. Pooley*, 11 Exch. 638.

(*n*) *The Ella A. Clark*, Br. & L. 32; 32 L. J., P. M. & A. 211. See *ante*, pp. 97, 98.

(*o*) *Gibbs v. Charleton*, 26 L. J., Exch. 321. In *Ashwell v. Wood*, 3 Jur., N. S. 232, a master was entrusted by A., a stranger, with 5,000 dollars, to be paid on the completion of a contract which afterwards went off, and he applied the money in the purchase of provisions, necessary repairs, and wages for the benefit of the owners, and forwarded to A. a bill of exchange on the owners for the amount (which they refused to accept) and as a collateral security a bill of lading for a portion of the cargo. Upon a bill being filed, praying that the money might be paid by the owners, or that it might be declared that A. was entitled to a lien

on the portion of the cargo comprised in the bill of lading, it was held, that as to so much of the plaintiff's money as the defendants had had the benefit of, although the acts of the master were unauthorized by them, the plaintiff was entitled to the proceeds of the cargo.

(*p*) *Webster v. Seekamp*, 4 B. & A. 352; and see *ante*, p. 99.

(*q*) *Mackintosh v. Mitcheson*, 4 Exch. 175; *Rocher v. Busher*, 1 Stark. 27; *Palmer v. Gooch*, 2 ib. 428; *Thacker v. Moates*, 2 M. & Rob. 79. See also *The Aaltje Willemina*, L. R., 1 A. & E. 107, where advances to pay averages were held not to be necessities.

(*r*) *Thacker v. Moates*, *ubi sup.* See *post*, Chap. VIII., *HYPOTHECATION*.

(*s*) *The James Seddon*, L. R., 1 A. & E. 62.

that the master could not pledge the owner's credit for their board and lodging (*t*).

Hypothecation or sale of ship or cargo.

The authority of the master to sell or pledge the ship or cargo in cases of necessity will be noticed in Chapter VIII. on HYPOTHECATION. It is right, however, to mention here, that the master has no authority to hypothecate the ship save for necessary repairs, unless he is without funds and is unable to provide funds in any other way than by hypothecation; and it is necessary to the validity of the transaction that the repayment of the loan should be made to depend on the arrival of the ship. An instrument providing that if bills drawn by a master on his owners were not accepted or paid the lender might take possession of the ship, was held to be inoperative as a bottomry bond (*u*).

Although the immediate control of the ship as to her employment is vested in the master, he has no power to alter the voyage (*x*), or to vary the rate of freight at which goods are to be shipped (*y*), in contravention of the agreement made between his owner and the freighter, or to make freight payable beforehand, or to any person other than the owner (*z*); nor can he charge his owners by signing bills of lading for more cargo than is shipped (*a*).

Liability of owners for his torts.

The owners are not only liable upon contracts entered into by the master, but may be made answerable in tort for acts done by him in the ordinary course of his duty (*b*). Where he is appointed by the owners, this liability has been held to attach to them although the ship has been chartered to Government or to private individuals, and is, as far as her disposition is concerned, under the direction of an agent appointed by the charterers (*c*).

(*t*) *Organ v. Brodie*, 10 Exch. 449; *The Bonne Emilie*, L. R., 1 A. & E. 19.

(*u*) *Stainbank v. Fenning*, 11 C. B. 51; *The Emancipation*, 1 Rob. 124. The law forbids the creditor to have a direct remedy on the bond itself against the owner as well as the ship, but a bottomry bond may be given at the same time with and as a collateral security for bills drawn on the owner—for the money borrowed. *Stainbank v. Shephard*, 13 C. B. 418; *The Staffordshire*, L. R., 4 P. C. 194; *The Onward*, L. R., 4 A. & E. 38. The owner may, if he think fit, hypothecate the ship, and make himself personally liable. See the judgment in *Willis v. Palmer*, 7 C. B., N. S. 360.

(*x*) *Burton v. Sharpe*, 2 Camp. 52. See also *ante*, p. 155.

(*y*) *Dewell v. Moxon*, 1 Taunt. 391.

(*z*) *The Sir Henry Webb*, 13 Jur. 639; *Walsh v. Provan*, 8 Exch. 843; *Reynolds v. Jex*, 34 L. J., Prob. & Adm. 251.

(*a*) *McLean v. Fleming*, L. R., 2 H. L. Sc; *Brown v. Powell, &c. Steam Coal Co.*, L. R., 10 C. P. 562; *Hubbersty v. Ward*, 8 Exch. 330. The statement in the bills of lading is ordinarily conclusive against himself. (18 & 19 Vict. c. 111, s. 3.) See, however, *post*, CONTRACT OF AFFREIGHTMENT.

(*b*) *The Excelsior*, L. R., 2 A. & E. 269.

(*c*) *Fletcher v. Braddick*, 2 N. R. 182;

The owners are not, however, responsible for damage wilfully done by a master, where the act is not within the scope of his ordinary duty or sanctioned by them (*d*). Where a master, acting *bonâ fide* and meaning to execute the duties of his employment, sold a portion of the cargo under circumstances not justifying the step, this was held to be a joint conversion by him and his owner, for which both were liable to the merchant in an action of trover (*e*).

The master, whilst afloat, or in a foreign port where there is no agent of the shipper, acts in a double capacity; he is the agent of the owner as to the ship and freight, and of the merchant as to the goods (*f*); and he should in these cases do that which, in the exercise of a sound discretion, is the best for both parties (*g*). One of the most critical points he has to decide is, whether, in the event of the ship receiving such an injury during the voyage as to prevent her from completing it under any circumstances, the cargo should be transhipped, so that it may be conveyed to its port of destination, or should be sold (*h*). He cannot bind the merchant by a contract for the forwarding of the goods in a substituted ship, and at another rate of freight, without making every reasonable effort to communicate with the merchant (*i*). The implied authority of the master to sell the cargo only arises in cases where there is a necessity for an early sale and communication with the owner is impracticable (*j*).

HIS POWER
TO BIND THE
FREIGHTERS.

Another important agency which the master may be called upon to exercise arises in cases of constructive total loss. In these cases it often becomes a question whose agent he is in the performance of any particular acts which he may do for the benefit of all concerned. The true rule appears to be, that, so

AGENCY IN
CASES OF CON-
STRUCTIVE
TOTAL LOSS.

Fenton v. Dublin Steam Packet Company, 8 A. & E. 835.

(*d*) *The Druid*, 1 W. Rob. 391; *The Ida*, 1 Lush. 6.

(*e*) *Kubank v. Nutting*, 7 C. B. 797; *Schuster v. McKellar*, 7 E. & B. 704.

(*f*) *Per Lord Denman*, in *Shipton v. Thornton*, 9 A. & E. 337. He is not, however, the agent of the owners of the cargo unless in cases of necessity. *Per Lord Stowell*, in *The Mercurius*, 1 Rob. 84. See *Wagstaff v. Anderson*, 4 C. P. D. 283, where, having regard to the special terms of the charter-party, it was sought to render the charterers liable for the act of the

master in improperly selling the cargo; it was held that the master in selling the cargo did not act as the agent of the charterers.

(*g*) *Per Lord Mansfield*, *Miles v. Fletcher*, Doug. 234; *per Buller, J.*, 1 T. R. 612, note; *Matthews v. Gibbs*, 30 L. J., Q. B. 65; *Notara v. Henderson*, L. R., 7 Q. B. 225. See also the judgment of the Privy Council in *The Cargo ex Argos*, L. R., 5 P. C. 165.

(*h*) See *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*i*) See *Gibbs v. Grey*, 2 H. & N. 22.

(*j*) *Morse v. The Australasian Steam N. Co.*, L. R., 4 P. C. 222.

long as he acts *bonâ fide* and within the limits of his authority, he is the agent (although involuntarily created) of that person, whether the assured, or the underwriter, in whom the interest and risk may be vested at the time, although that fact may not be determined until afterwards (*k*).

JETTISON.

Another instance in which the master must exercise the discretion of an authorized agent over the cargo arises in the case of *jettison*, which is the throwing overboard of goods from necessity, to lighten the vessel in a storm, or to prevent capture. Whether such a necessity exists as to justify the sacrifice depends upon the circumstances of each case; but if it does, the authority of the master is clear. He may, in the reasonable exercise of his discretion, select what articles and determine what quantity shall be sacrificed; indeed, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, he may throw the whole cargo overboard (*l*).

RANSOM.

There exists also, by the general maritime law, a right on the part of the master, when the ship or cargo is captured by an enemy, or by pirates, to ransom it on behalf of the owners to the extent of its value (*m*). In the former of these cases, however, the legislature of this country has, from obvious motives of policy, from time to time passed provisions restricting this right. The act now in force is the "Prize Act, 1864" (*n*), and the 45th section enables the Queen, by order in council, to make orders for prohibiting or allowing the ransoming of any ship or goods belonging to her subjects, and captured by her Majesty's enemies (*o*). But in the latter case the right still remains.

(*k*) *Post*, Chap. VII., INSURANCE. In *Benson v. Chapman*, 2 H. of L. Cases 720, it is said that the duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo, and earn the freight if possible.

(*l*) *Per* Lord Stowell, in *The Grati-*

tudine, 3 Rob. 258; and *post*, Chap. VI., CONTRACT OF AFFREIGHTMENT.

(*m*) *Per* Lord Stowell, in *The Gratitude*, *ubi sup.*

(*n*) The 27 & 28 Vict. c. 25, Appendix, p. ccclix. The 45th section of the act confers jurisdiction in cases of ransom upon the Admiralty Division of the High Court.

(*o*) *Post*, Chap. VI., CONTRACT OF AFFREIGHTMENT, and the 27 & 28 Vict. c. 25, s. 45.

CHAPTER IV.

THE CREW.

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In an earlier Chapter some of the rights and duties of the crew have been incidentally mentioned; it is now proposed to consider the subject more fully.

THE ORDINARY CREW.

The crew, in the ordinary sense of the word, includes the whole of the ship's company, except the master; that is to say, the mate or mates who are next in authority after the master, the carpenter, the carpenter's mate, the boatswain, the sailmaker, the steward, the cook, and the able and ordinary seamen and boys (a). To these must be added in the case of steam ships the engineers and firemen. Each member of the crew has special duties to perform, which are well defined by usage; any detail, however, as to the mode in which these duties are distributed, would be out of place in the present work (b).

We have considered in the preceding Chapter the statutory regulations with reference to certificated masters and mates on board foreign-going ships and home trade passenger ships (c); and it is necessary to call attention to those regarding certificated engineers on board of steam ships.

CERTIFICATED ENGINEERS IN STEAM SHIPS.

Section 5 of the Merchant Shipping Act, 1862, provides, that every steam ship required by the Merchant Shipping Act, 1854, to have on board a master possessing a certificate from the Board of Trade, must also carry an engineer or engineers possessing a certificate (d) from the Board as follows:—

(1.) Engineers' certificates are to be of two grades, viz., "first

(a) The word "seamen," as used in the Merchant Shipping Acts, includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship, The M. S. Act, 1854, s. 2.

(b) See, upon this subject, Dana's *Seaman's Manual*.

(c) *Supra*, p. 115.

(d) The declarations required by sect. 309 of the M. S. Act, 1854, to be given by engineer surveyors on the survey of passenger steamers, must now contain a statement with reference to the engineers' certificates in the cases provided for by the M. S. Act, 1862; see sect. 12 of that act, and *post*, Chap. XI. PASSENGERS.

class engineers certificates," and "second class engineers certificates:"

- (2.) Every foreign going steam ship of one hundred nominal horse power or upwards must have as its first and second engineers two certificated engineers, the first possessing a "first class engineers certificate," and the second possessing a "second class engineers certificate" or a certificate of the higher grade:
- (3.) Every foreign going steam ship of less than one hundred nominal horse power must have as its only or first engineer an engineer possessing a "second class engineers certificate," or a certificate of the higher grade:
- (4.) Every sea going home trade passenger steam ship must have as its only or first engineer an engineer possessing a "second class engineers certificate," or a certificate of the higher grade:
- (5.) Every person who, having been engaged to serve in any of the above capacities in any such steam ship as is above mentioned, goes to sea in that capacity without being at the time entitled to and possessed of such certificate as is required by the act, and every person who employs any one in any of the above capacities without ascertaining that he is at the time entitled to and possessed of such a certificate, incurs a penalty not exceeding fifty pounds.

By sect. 6 of the same act, the Board of Trade is required to Examination. examine persons who are desirous of obtaining certificates of competency as engineers; and may from time to time appoint and remove examiners, and award the remuneration to be paid to them; it may also lay down rules as to the qualification of applicants, and as to the times and places of examination; and generally do all acts which it thinks expedient in order to carry into effect the examination of such engineers (e).

By sects. 7 and 8, applicants for examination must pay such fees, not exceeding the sums specified in a table marked (B.) in the schedule to the act, as the Board may direct (f); and the Certificates of competency and service, Board must deliver to every applicant who is duly reported to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, and ability, a

(e) As to the authority of the Board of Trade to establish mercantile marine offices where none exist, see *supra*,

p. 114.

(f) See Appendix, "Forms," Nos. 23 and 55.

certificate of competency, as first class engineer or as second class engineer, as the case may be (*h*).

By sect. 9, certificates of service for engineers, differing in form from certificates of competency, are to be granted as follows:—

- (1.) Every person who before the first day of April, one thousand eight hundred and sixty-two, has served as first engineer in any foreign going steam ship of one hundred nominal horse power or upwards, or who has attained or may attain the rank of engineer in the service of the Queen, or of the East India Company, is entitled to a "first class engineers certificate" of service:
- (2.) Every person who before the day above mentioned has served as second engineer in any foreign going steam ship of one hundred nominal horse power or upwards, or as first or only engineer in any other steam ship, or who has attained or may attain the rank of first class assistant engineer in the service of the Queen, is entitled to a "second class engineers certificate" of service:

Each of these certificates of service contains particulars of the name, place, and time of birth, and the length and nature of the previous service of the person to whom the same is delivered; and they are deliverable to the persons entitled to them, upon their proving themselves to have attained the rank or to have served as above mentioned, and upon their giving a full and satisfactory account of the particulars required by the statute (*i*).

Cancellation
or suspension
of certificates.

The powers given by the 241st section of the Merchant Shipping Act, 1854, to the Board of Trade and to local marine boards, of instituting investigations into the conduct of any masters or mates who are believed to be unfit from incompetency or misconduct to discharge their duties (*k*), are extended, by sects. 11 and 23 of the Merchant Shipping Act of 1862, to certificated engineers.

We have seen that formerly British ships must have been

(*h*) As to colonial certificates of competency, see the M. S. (Colonial) Act, 1869 (32 Vict. c. 11), s. 8; Appendix, "Orders in Council," pp. 1 to 12; and *ante*, p. 114.

(*i*) Sect. 10 of the M. S. Act, 1862, also provides that the provisions of the M. S. Act, 1854, as to the recording by the Registrar-General of Seamen of the granting and cancellation of certificates of competency and service, the granting of copies in cases of loss,

the punishment of false representations with reference to the forging of certificates, the production of certificates on the shipping and discharging of crews, and the clearing outwards of ships (see ss. 138, 139, 140, 161 and 162), shall be applicable to certificates granted to engineers under the provisions mentioned above.

(*k*) See the M. S. Act, 1854, s. 241, and *ante*, p. 116, note (*u*).

navigated by a certain proportion of British seamen, (*l*), but that no such regulation is now in force (*m*).

Statutory provisions have been made, from an early period, for the putting of parish boys as apprentices to the sea service (*n*). The Merchant Seamen's Act, 7 & 8 Vict. c. 112, contained numerous provisions upon this subject which are now repealed. The statute now in force is the Merchant Shipping Act, 1854, which provides, by sect. 141, that shipping masters (now called mercantile marine superintendents) shall, if applied to for the purpose, give to any board of guardians, overseers or other persons desirous of apprenticing boys to the sea service, and to masters and owners of ships requiring apprentices, such assistance as is in their power for facilitating the making of such apprenticeships. The superintendents may receive from persons availing themselves of their assistance, such fees as may be fixed by the Board of Trade, with the concurrence, so far as relates to pauper apprentices, in England, of the Poor Law Board, and so far as relates to pauper apprentices in Ireland, of the Poor Law Commissioners in Ireland (*o*). By sect. 142, the indentures must be executed by the boy, and the person to whom he is bound, in the presence of and be attested by two justices of the peace, who are bound to ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master is a proper person for the purpose.

All indentures of apprenticeship to the sea service are exempt from stamp duty (*p*); and must, by sect. 143, be made in duplicate; and every person to whom any boy is bound as an apprentice to the sea service in the United Kingdom must, within seven days after the execution of the indentures, take or transmit the same to the Registrar-General of Shipping and Seamen, or to some mercantile marine superintendent; and the registrar or superintendent must retain and record one copy, and indorse on the other that the same has been recorded, and re-deliver it to the master; and whenever any indenture is assigned or can-

(*l*) *Ante*, p. 27.

(*m*) *Id.*

(*n*) See the 43 Eliz. c. 2, s. 5, the 2 & 3 Anne, c. 6, s. 6, and the 4 Anne, c. 19, which last act contained a temporary provision by which insolvent debtors who gave up their property, and persons imprisoned for debts not exceeding 60*l.*, might obtain their discharge by serving in the navy during

the then war.

(*o*) See Appendix, "Forms," No. 55.

(*p*) The M. S. Act, 1854, s. 143, and the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3. Forms of indentures of apprenticeship sanctioned by the Board of Trade may be obtained from the Queen's printers.

celled or any apprentice dies or deserts, the master must, within seven days, if the event happens within the United Kingdom, or if it happens elsewhere, as soon afterwards as circumstances permit, notify the same either to the Registrar-General of Shipping and Seamen or to some superintendent, to be recorded; and every person who fails to comply with these provisions incurs a penalty not exceeding ten pounds. Sect. 144 provides, that, subject to these provisions, all apprenticeships to the sea service made by guardians or overseers of the poor, or persons having the authority of guardians of the poor, must, if made in Great Britain, be made in the same manner and subject to the same laws and regulations as other apprenticeships by the same persons. If made in Ireland, the apprenticeships are subject to certain special rules laid down in the statute (*p*).

In order to prevent any evasion of these provisions, sect. 145 provides, that the master of every foreign going ship must before carrying any apprentice to sea from any place in the United Kingdom, cause the apprentice to appear before the superintendent of the mercantile marine office before whom the crew is engaged, and produce to him the indenture by which the apprentice is bound, and the assignment thereof (if any); and the name of the apprentice, with the date of the indenture and of the assignment, and the name of the ports at which the same may have been registered, must be entered on the agreement; and for any default in these respects the master incurs a penalty not exceeding five pounds.

The masters and owners of all ships belonging to any subject of the Queen, and of the burthen of eighty tons and upwards (except pleasure yachts), were formerly bound, under heavy penalties, to carry on board a certain number of apprentices proportioned to the tonnage of the vessel (*q*). But this provision making the carrying of apprentices compulsory has been for some years repealed (*r*).

The rights and remedies of apprentices with respect to their wages are now in all material respects similar to those of ordinary seamen (*s*). It has, however, been held, in a case decided before the passing of the Judicature Acts, that the Court of Admiralty possessed no jurisdiction to order the amount of a penalty contained in the indenture of apprenticeship to be paid

(*p*) See the M. S. Act, 1854, the latter part of sect. 144.

(*q*) 7 & 8 Vict. c. 112, s. 37.

(*r*) See 12 & 13 Vict. c. 29, which is

now also repealed by the M. S. Repeal Act, 1864 (17 & 18 Vict. c. 120).

(*s*) See *post*, pp. 221, 223, 241, note (*k*).

out of the proceeds of the vessel in which the apprentice had served (*t*).

No settlement is now acquired by apprenticeship to the sea service (*u*).

Impressment, which in former times was frequently resorted IMPRESSMENT.
to for obtaining hands for Queen's ships in time of war, must be here mentioned. The power exercised in this respect by the Crown is founded on immemorial usage, and cannot be justified by any reason but the safety of the state, and the maxim of the constitutional law of England, that it is better to submit to private mischief than that public detriment should ensue (*x*). Although this power does not rest on any statute, and has been yielded to, owing to its arbitrary nature, with great reluctance, it is undoubtedly legal, and has frequently been recognized by acts of parliament (*y*).

The general rule is, that all seamen, seafaring men, and also persons whose occupations and callings are to work in vessels or boats on rivers, are liable to be impressed. These are the classes included in the ordinary Admiralty warrants. Officers are not included within this description (*z*).

There are several exemptions from this general liability, Exemptions
by usage.
which are founded either upon immemorial usage, or upon special statutory or Admiralty protections. Thus ferrymen are said to be exempt on grounds of public convenience (*a*), but seamen are not protected by reason of their being freeholders (*b*), nor are freemen, liverymen, or watermen of the city of London (*c*). Nor is the holding of an office, imposed

(*t*) *The Albert Crosby*, Lush. 44.

(*u*) 4 & 5 Will. 4, c. 76, s. 67.

(*x*) *Per* Lord Mansfield, in *Rex v. Tubbs*, Cowp. 517.

(*y*) See *Forster's Crown Law*, 164, where the early history of impressment is inquired into, and the 2 R. 2, c. 4, where the existence of the practice is assumed, and *The Case of Pressing Mariners*, 18 State Trials, 1326, A.D. 1743. See also *Cornor's Crown Practice*, ed. 1844, 117. A greater grievance formerly existed, as appears by the Rolls of Parliament in the fourteenth and fifteenth centuries, which contain frequent complaints of the undoing of the merchants of England, by reason of the impressing of their ships into the service of the Crown. See 2

Rolls of Parl. 307, 320; 3 *ib.* 66; 4 *ib.* 79.

(*z*) *Per* Lord Mansfield, in *Rex v. Tubbs*, Cowp. 517. But it does not appear that the master of a merchant vessel is by law exempt from impressment. At all events, the Courts have refused to interfere where there has been any suspicion that the appointment was colourable. *Barrow's Case*, 14 East, 346. See also *Ex parte Chalacombe*, 13 East, 550, note.

(*a*) *Ex parte Fox*, 5 T. R. 276; Saville, 14.

(*b*) *Rex v. Douglas*, 5 East, 477; *Rex v. Tubbs*, Cowp. 517; and see the observations of Blackstone, J., on this point in *Goldswain's Case*, 2 Bl. 1210.

(*c*) *Rex v. Young*, 9 East, 466.

by law, such as that of a head-borough, any ground of exemption (*d*).

By statute.

Statutory exemptions, formerly more numerous, are now only as follows:—The 13 Geo. 2, c. 17, protects all foreigners serving in British trading ships or privateers, all persons aged fifty-five, or upwards, or under eighteen, and all persons of any age for two years from the time of their first going to sea. And all persons who have not before used the sea, and who bind themselves apprentices to serve at sea, are by the same act protected for three years from that period (*e*).

By the 5 & 6 Will. 4, c. 24, Admiralty protections for two years are to be given to all seamen who have served five years during any proclamation calling for the services of seafaring men; but seamen discharged during the five years, not on their own application, are entitled to a protection for one year only (*f*).

Admiralty
protections.

In addition to the protections required to be granted by statute, protections have customarily been granted by the Admiralty as matter of favour; but the security afforded by such is not very great, for it has been held, that such a protection granted for a given time may be revoked within that period if the exigency of the public service require it (*g*). Where, however, a bargeman was protected by the navy board while carrying timber to the King's docks, it was held, with more justice, that he could not be impressed under an Admiralty warrant which distinctly specified that no protections were to be regarded (*h*).

It is unlawful to commute the services of an impressed person for money, and a bond given to secure his return on the non-payment of a sum of money has been held to be void (*i*).

(*d*) *Ex parte Fox*, 5 T. R. 276.

(*e*) A keelman, who had been previously employed in navigating down the river Tyne to Shields, was held not to be entitled to protection as a person who had never before used the sea; *Ex parte Softly*, 1 East, 466. Where an apprentice is impressed, the master has a remedy by action if he has been improperly taken away, but he cannot sue out a *habeas corpus*, although the apprentice may. On the application of either of them, however, a warrant of discharge may be issued by the Chief Justice of the Queen's Bench; *Ex parte Lansdown*, 5 East, 38; *Foster v. Stewart*, 3 M. & S. 191; *Rex v. Edwards*, 7 T. R. 745; *The*

Apprentices' Case, 1 Leach, C. C. 203. The 50 Geo. 3, c. 108, s. 2, protected in certain cases masters, apprentices, mariners and landmen employed in fishing vessels. This act was repealed by 31 & 32 Vict. c. 45, sched. 2. See also 28 Geo. 3, c. 41, s. 17, repealed by the Statute Law Revision Act, 1861; and as to firemen, 14 Geo. 3, c. 78, s. 82, repealed by 28 & 29 Vict. c. 90, s. 34.

(*f*) 5 & 6 Will. 4, c. 24, ss. 1 and 2. By 16 & 17 Vict. c. 69, s. 1, these provisions are extended to seamen entering for continuous service.

(*g*) *Herbert's Case*, 16 East, 165.

(*h*) *Goldswaine's Case*, 2 Bl. 1207.

(*i*) *Pole v. Harrobin*, 9 East, 416, note; *S. C.*, 3 Dougl. 91.

The provisions of the recent statutes under which a reserve NAVAL RE-SERVE. volunteer force to serve in Queen's ships has been established, and regulations enacted for their remuneration and government, may be usefully noticed here.

By the 16 & 17 Vict. c. 73, power was given to the Admiralty to establish and train a body of Royal Naval Coast Volunteers, not exceeding ten thousand men, to be raised from among seafaring men and others; and by the 8th section of the act it was provided that volunteers under the act should, save as therein expressly provided, be protected from service in the royal navy.

The 22 & 23 Vict. c. 40, provides that it shall be lawful for the Admiralty to raise, and from time to time to keep up, a number of men, not exceeding thirty thousand, such men to be raised by voluntary entry from among seafaring men and others who may be deemed suitable for the service in which such volunteers may be employed, and to be so raised and entered at such times and in such places in the United Kingdom and the islands of Man, Guernsey, Jersey, Alderney and Sark, or any of them, by such persons and in such manner as the Admiralty shall from time to time direct.

This last-mentioned act contains provisions too numerous to be set out here at length; but it may be stated that it provides that every volunteer raised under the act shall be entered for the term of five years (*k*), and shall be trained and exercised for twenty-eight days in each year on shore or on board ship (*l*). Such volunteers are liable to be called into actual service on such occasions as to her Majesty may seem fit, and when so called into actual service, they are liable to serve in the navy for three years, and the time of service may be extended two years by proclamation (*m*). A volunteer not attending training at the time appointed, and not labouring under any infirmity incapacitating him, is liable to a penalty of 20*l*. (*n*); and a volunteer when called into actual service, not attending at the time and place appointed, may be apprehended and punished as a deserter from the navy (*o*).

The 17th section of this act requires that every mercantile Powers of mercantile marine super-marine superintendent acting under the Merchant Shipping Act,

(*k*) Sect. 2.
(*l*) Sect. 3.
(*m*) Sect. 5.

(*n*) Sect. 20.
(*o*) Sect. 21.

intendant as
to the Naval
Reserve.

1854, shall give all the assistance in his power towards carrying into effect the objects of the act in such manner as the Board of Trade, at the instance of the Admiralty, may direct; and every such mercantile marine superintendent shall for this purpose have the power to call for such answers or information concerning naval reserve men from the masters of and other persons belonging to British merchant ships as may be necessary or desirable in order to enable him to render such assistance as aforesaid, or to make any returns which the Board of Trade or the Admiralty may require; and every master of or other person belonging to a British merchant ship who, when duly called upon by the mercantile marine superintendent, omits or refuses to give any such answer or information as aforesaid which it is in his power to give, shall be liable to a penalty of 5*l*.

Officers of
Naval
Reserve.

The Officers of the Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 69), provides for her Majesty accepting the services of masters, mates and engineers of merchant ships to serve as officers of the Royal Naval Reserve, and continuing the services of all persons who had before the passing of that act been enrolled as officers of that force (*p*).

STATUTORY
PROVISIONS
FOR THE PRO-
TECTION OF
SEAMEN.

Provisions have been made by the legislature on numerous occasions for the encouragement and protection of merchant seamen. Some were introduced by early statutes (*q*), but the greater part of those in force are of modern date. The laws relating to merchant seamen were amended and consolidated, and provisions were made for the establishment of a general register of all the men engaged in the merchant service, by the 5 & 6 Will. 4, c. 19. At later periods, several acts were passed for the protection of merchant seamen and the regulation of the merchant navy. The more important of these were the general Merchant Seamen's Act (7 & 8 Vict. c. 112); the Seamen's Protection Act (8 & 9 Vict. c. 116); and the Mercantile Marine Act, 1850 (13 & 14 Vict. c. 93). All these acts are now repealed (*r*), and the law relating to this subject is now principally to be found in the Merchant Shipping Act, 1854, as amended by the Merchant

(*p*) The 24 & 25 Vict. c. 129, now repealed, contained provisions on this subject. See also the M. S. Act, 1872, s. 17, and Orders in Council of the 1st of March, 1864, and the 15th October,

1872.

(*q*) See 2 Geo. 2, c. 36, and 31 Geo. 3, c. 39.

(*r*) See the M. S. Repeal Act, 1851 (17 & 18 Vict. c. 120).

Shipping Acts of 1862, 1867, 1871, 1872, 1873, 1876, and the Merchant Shipping (Colonial) Act of 1869.

The recent statutes have greatly simplified the law with respect to the registration of seamen; and have abolished the system of register tickets which was established by the earlier acts, and which was not found to work well in practice (*s*). Registration of Seamen.

The provisions of the Merchant Shipping Act, 1854, as amended by the Amendment Act of 1862, as to the registration of seamen, are as follows:—

A general register and record office of seamen is established by the act, in the port of London, and is placed under the control of the Board of Trade, which has power to direct the business at any of the outports to be transacted at the mercantile marine office, or with the consent of the custom house authorities, at the custom house of the port, and may appoint the superintendent of the mercantile marine office (*t*), or some officer of the customs, to conduct the same (*u*).

The Registrar-General of Shipping and Seamen is bound to keep a register of all persons who serve in ships subject to the provisions of the statute (*x*).

We have already seen (*y*) that the masters of all foreign going ships, the crews of which are discharged in the United Kingdom, and the masters of all home trade ships, are bound to make Lists of the crew.

(*s*) The regulations of the earlier acts, with respect to register tickets, were numerous and intricate. A form of ticket issued by the Board of Trade, and containing a description of the bearer, and stating his age and place of birth, was in use. Each ticket was marked with a number, and no two tickets were ever allowed to be outstanding at the same time, bearing the same number. Lists of cancelled tickets were from time to time published, and these lists had, before this system was abolished, already extended to a considerable length. Special provisions were also made to prevent fraud, and the personation of one seaman by another. See the 7 & 8 Vict. c. 112. It is obvious that elaborate machinery of this description was very ill adapted to the habits and needs of the class of men to which it was

applied.

(*t*) Under the M. S. Act, 1854, these offices and officers were called "shipping officers" and "shipping masters." It is provided by sect. 15 of the M. S. Act, 1862, that they shall for the future be designated as is mentioned above. See *post*, p. 175, note (*d*).

(*u*) The M. S. Act, 1854, s. 271.

(*x*) *Ib.* s. 272. The agreements, lists and other papers transmitted to the registrar, under the provisions of the statute, furnish the necessary information for this purpose. By the M. S. Act, 1872, s. 4, the Registrar-General of Seamen is to be called the Registrar-General of Shipping and Seamen.

(*y*) *Ante*, p. 150. And see Appendix, "Forms," Nos. 24, 24A, 25, 25A, 25B, and 25C.

out lists of the crew, containing particulars as to any members of it that have been hurt during the voyage, and as to the wages and property of deceased seamen, and to deliver them to the superintendents of the mercantile marine offices, in the case of foreign going ships, within forty-eight hours after the ship's arrival at her final port of destination in the United Kingdom, or upon the discharge of the crew, and in the case of home trade ships, within fixed half-yearly periods (z).

Overcharges
in lodging
houses, &c.

The Merchant Shipping Act, 1854, contains several regulations for the protection of seamen, both when they are in lodgings on shore and when they are about to engage for any voyage.

By sect. 235 of this act, any person who demands or receives from any seaman or apprentice payment in respect of his board or lodging in the house of such person for a longer period than the actual residing or boarding in it, is liable to a penalty not exceeding ten pounds; and, by sect. 236, if any one receives or takes possession of the money, documents or effects of any seaman or apprentice, and does not return them, or pay their value, when required by the seaman or apprentice, subject to the deduction of any debt justly due, or absconds with them, he is liable to a penalty not exceeding ten pounds; and two justices may direct the amount or value of what is detained, subject to such deduction, to be paid to the seaman.

Penalty for
prevention of
crimping.

With the view of preventing improper interference with seamen on the termination of a voyage, it is provided by sect. 237 of the Merchant Shipping Act, 1854, that any one, not being in the Queen's service, or duly authorized by law for the purpose, who goes on board a ship about to arrive at her place of destination before her actual arrival in dock, or at the place of her discharge, without the permission of the master, may be taken into custody by the master or person in charge of the ship, and sent before a magistrate, and is liable also to a penalty not

(z) The M. S. Act, 1854, ss. 109, 273—275. Where any ship is lost or abandoned, or loses the character of a foreign going or home trade ship, by reason of transfer of ownership or change of employment, the lists are to be sent home to the superintendent, at the port to which the ship belonged; *ib. s. 276*. The documents delivered or transmitted to the superintendents, or officers of customs, under the act, are forwarded ultimately to the Regis-

trar-General of Shipping and Seamen, and are open to public inspection; *ib. s. 277*. The provisions of the M. S. Act, 1854, as to the transmission of lists of the crew, extend to fishing vessels, even if employed exclusively on the coasts of the United Kingdom, and to pleasure yachts, and ships belonging to the Trinity House, the Commissioners of Northern Lighthouses, and to the Commissioners of Irish Lights; see sect. 109.

exceeding twenty pounds (*a*). A penalty not exceeding five pounds is also imposed by sect. 238, on any one who, on board a ship within twenty-four hours after her arrival in a port of the United Kingdom, solicits any seaman to become a lodger at the house of any person letting lodgings for hire, or who takes out of the ship any effects of any seaman except under his personal direction and with the master's permission (*b*).

Under the Merchant Shipping Act, 1854, and the Merchant Shipping Act, 1862, provision is made for the establishing and regulation of local marine boards (*c*), which are to carry into execution the provisions of these statutes and of mercantile marine offices, for the regulation of the hiring of seamen.

It is provided by sect. 110 of the Merchant Shipping Act, 1854, that local marine boards are to exist at those sea ports of the United Kingdom at which they had been established under the acts formerly in force, and at such other places as the Board of Trade shall appoint (*d*).

LOCAL
MARINE
BOARDS.

(*a*) See as to what is a ship's "place of destination" and place of discharge, *Attwood v. Case*, L. R., 1 Q. B. D. 134.

(*b*) Provisions, in some respects similar, were contained in the 8 & 9 Vict. c. 118.

(*c*) These were first established by the 13 & 14 Vict. c. 93, which is repealed by the M. S. Repeal Act, 1854.

(*d*) Boards have been established at London, Liverpool, Bristol, Hull, Shields, Leith, Glasgow, Dublin, Cork, and other ports, under the 13 & 14 Vict. c. 93. For the list of the boards existing at the present time, see *ante*, p. 113, n. (*g*). As to the duties of marine boards with respect to masters and mates, see *ante*, p. 113.

The constitution of these boards is as follows:—The mayor or provost and the stipendiary magistrate, or such of the mayors or provosts and stipendiary magistrates of the place (if more than one) as the Board of Trade may appoint, are members *ex officio*. The Board of Trade is empowered to appoint four members from persons residing or having places of business at the port or within seven miles of it; and the owners of foreign going ships and of home trade passenger ships registered at the port may elect six members. The elections take place on the

twenty-fifth day of January in every third succeeding year, and the appointments must take place within one month after the elections. The functions of the existing boards cease on the constitution of the new boards. Any vacancy caused in the intervals between the general elections and appointments must be filled up within one month after it occurs; and every person elected or appointed on such a vacancy continues a member until the next constitution of a new board. The mayor or provost is authorized to fix the place and mode of conducting the elections, and also, on occasional vacancies, the day of election, and he must give at least ten days' notice of it. Lastly, the Board of Trade has power to decide any questions concerning the elections. By sect. 112 of the M. S. Act, 1854, the collectors or comptrollers of customs, with the assistance of the Registrar-General of Shipping and Seamen, are bound to make out every three years lists of the persons entitled to vote at the boards. These lists are, by sects. 113 and 114, to be revised in every third year by two justices nominated by the mayor or provost, who are to be assisted by the production to them by the collector or comptroller of customs of the books containing the register of the ships

By sect. 114 of the Merchant Shipping Act, 1862, it is recited that doubts have been entertained whether local marine boards have the power of determining a quorum, and it is declared that the power given by the Merchant Shipping Act, 1854, to all local marine boards of regulating the mode in which their meetings are to be held and their business conducted includes the power of determining a quorum, but that for the future such quorum shall never consist of less than three members.

By sect. 111 of the Merchant Shipping Act, 1854, the owners of foreign going ships and home trade passenger ships registered at any sea port are entitled to vote at the election of members of these boards (c).

The boards are bound by sect. 119 to keep minutes of their proceedings and to make returns, if required, to the Board of Trade; their acts are not invalidated by irregularities in the elections, or by reason of the want of qualification of their members, or by irregularities and errors in the lists of voters (s. 118); and the Board of Trade has, by sects. 120 and 121, a

registered at the sea port (see *ante*, p. 16), together with any certified extracts or returns (see sect. 94) from the books of the Registrar-General of Shipping and Seamen which may be necessary. By sect. 115 of the same act, the expenses of making, printing and revising these lists must be certified by the justices; and these expenses and the expenses of elections may be allowed and paid by the Board of Trade. By sects. 116 and 117, every person whose name appears in the revised list of voters is qualified to vote at the election of members of the local marine board; and all persons qualified to vote and continuing to be owners of the requisite amount of tonnage (and such persons only) are qualified to be elected and to act as members of the board.

(c) By the same section every registered owner of not less than two hundred and fifty tons in the whole of such shipping has, at every election, one vote for each member for every two hundred and fifty tons owned by him, so that his votes for any one member do not exceed ten. The section lays down the following rules for the purpose of ascertaining the qualification of the electors. In the case of a ship registered in the name of one person, he is to be deemed

to be the owner; and in the case of a ship registered in distinct and several shares in the names of more persons than one, the tonnage is to be apportioned among the owners, as nearly as may be, in proportion to their respective shares, and each of them is to be deemed to be the owner of the tonnage so apportioned to him; and in the case of a ship or shares of a ship registered jointly without severance of interest, in the names of more persons than one, the tonnage is (if sufficient, either alone or together with other tonnage owned by the joint owners, to give a qualification to each of them) to be apportioned equally between the joint owners, and each of them is to be deemed to be the owner of the equal share apportioned to him; but if the tonnage is not so sufficient, the whole of it is to be deemed to be owned by such of the joint owners resident or having a place of business at the port or within seven miles thereof as is first named on the register. In making this apportionment, any portion may be struck off so as to obtain a divisible amount; and the whole amount of tonnage owned by each person, whether in ships or shares of or interests in ships, must be added together, and if sufficient, constitutes his qualification.

discretionary power of interference with and control over the acts and appointments of the boards.

The provisions of the Merchant Shipping Act, 1854, as to mercantile marine offices, are as follows (d) :—

MERCANTILE
MARINE
OFFICES.

By sect. 122, in all sea ports in the United Kingdom in which there is a local marine board, the board is bound to establish a mercantile marine office or offices, and may for that purpose, subject to the provisions of the act, procure the requisite premises, and appoint, and from time to time remove and reappoint the superintendents of these offices, with any necessary deputies, clerks and servants. The board may also regulate the mode of conducting business at these offices, and it has, subject to the powers of the Board of Trade, a complete control over the same. All acts done before duly appointed deputies are as valid as if done before a superintendent.

By sect. 123, the sanction of the Board of Trade is necessary so far as regards the number of the superintendents of these offices, and the amount of their salaries and wages and other expenses. The Board of Trade has the immediate control of the offices, so far as regards the receipt and payment of money at them. All superintendents and their deputies, clerks and servants must, before entering upon their duties, give such security as the Board of Trade may require; and if in any case the Board of Trade has reason to believe that any superintendent, deputy, clerk or servant does not properly discharge his duties, it may cause the case to be investigated, and may remove him from his office, and appoint another person in his place.

The duties of the superintendents of mercantile marine offices relate chiefly to the following matters:—By the Merchant Shipping Act, 1854, s. 124, they are required to afford facilities for engaging seamen by keeping registries of their names and characters, to superintend and facilitate the engagement

Superin-
tendents of
mercantile
marine offices.

(d) These offices were first established by the 13 & 14 Vict. c. 93. It has been already mentioned that sect. 15 of the M. S. Act, 1862, provides that the old terms "shipping offices" and "shipping masters" shall no longer be used, and that these offices and officers shall be termed "mercantile marine offices" and "mercantile ma-

rine office superintendents." This section expressly provides, that nothing in it contained shall invalidate or affect any act which may be done at any such office under the title of a shipping office, or any act which may be done by, with, or to any of these officers under the title of shipping master, or deputy shipping master.

and discharge of seamen (*e*), the making of apprenticeships, and to provide means for securing the presence on board at the proper times of the men who are engaged (*f*).

These officers, whose duties are of an important character, are entitled to demand fees according to a fixed scale. By sect. 125, they may refuse to proceed with any engagements or discharges unless the fees are first paid (*g*); and by sect. 126, owners or masters, who are bound to pay these fees in the first instance, may reimburse themselves in part by retaining from the wages of all persons (except apprentices) sums of money not exceeding certain sums fixed by the act (*h*). It is however provided by sect. 126, that if the sum which the owner is entitled to deduct exceeds in any case the amount of the fee, the excess must be paid by him to the superintendent, in addition to the fee.

Powers of
Board of
Trade with
respect to
mercantile
marine offices.

By sect. 128, at places where no separate mercantile marine office is established, the Board of Trade may, with the consent of the Commissioners of Customs, cause the business of a mercantile marine office to be conducted at the Custom House, under an officer of customs; the Board may, by sect. 129, also appoint any superintendent or other person connected with any sailors' home in the port of London to act as a superintendent of such an office under the act. In the last-mentioned case, the superintendent is responsible directly to the Board of Trade, and not to the local marine board of the port. By the Merchant Shipping Act, 1873, s. 10, the Board of Trade may, instead of conducting the business of a mercantile marine office at a custom house, procure buildings and appoint the necessary clerks and servants for conducting the business.

Sect. 130 of the Act of 1854 vests in the Board of Trade a dispensing power, with respect to transactions which the act requires to take place before a mercantile marine office superin-

(*e*) The M. S. Act, 1854, sect. 109, rendered the provisions of the act with reference to the shipping and discharge of seamen in the United Kingdom, applicable to all sea going British ships, wherever registered, and to the owners, masters, and crew of those ships; but see now the M. S. Act, 1862, s. 13, and *post*, p. 186, note (*x*).

(*f*) As to the duties of the mercantile marine superintendents with regard to the Naval Reserve, see the

Naval Reserve Act, 1859 (22 & 23 Vict. c. 40), s. 17, *supra*, p. 169. For their duties with regard to seamen's savings banks, see 19 & 20 Vict. c. 41, s. 2, App. p. cxi., and *post*, p. 233.

(*g*) See, as to these fees, The M. S. Act, 1854, Sched. Table P., App. p. clx, and note (*a*), "Forms," No. 21, and "Forms," No. 55, and note (*a*).

(*h*) See The M. S. Act, 1854, Sched. Table Q.

tendent. It also enables the Board to dispense from time to time with the transaction before a superintendent, or in a mercantile marine office, of any matters required by the act to be so transacted.

By sect. 16 of the Merchant Shipping Act, 1862, it is provided that any person appointed to any office or service by or under any local marine board, is to be deemed a clerk or servant within the meaning of the 24 & 25 Vict. c. 96, s. 68 (i); and that if any such person fraudulently applies or disposes of any chattel, money, or valuable security received by him, while employed in such office or service for or on account of any local marine board, or any other public board or department, to his own use, or any other purpose than that for which the same was paid, entrusted to, or received by him, he is to be deemed guilty of embezzlement. The same consequence follows if any such person fraudulently withholds, retains, or keeps back any such chattel, money, or valuable security, contrary to any lawful directions or instructions, which he is required to obey in relation to such office or service.

Person in service under local marine board fraudulently disposing of money to be guilty of embezzlement.

The powers and duties of the superintendents of mercantile marine offices, with reference to the engagement and discharge of seamen and settlement of claims for wages, will be mentioned in a later part of this Chapter (k).

The general duties of the crew are best described in the words of the agreement which the master and crew of every ship, except ships of less than eighty tons register solely employed in the coasting trade, are bound to execute before the commencement of the voyage. The crew must conduct themselves in an orderly, faithful, honest, and sober manner, and must be at all times diligent in their respective duties; they are also bound to obey the lawful commands of the master, and of their superior officers, in everything relating to the ship, and the

DUTIES OF THE CREW.

(i) This section provides that in cases of embezzlement by a clerk or servant, he is to be deemed to be guilty of feloniously stealing from his master or employer, although the money, chattel, or security embezzled was never received into the master or employer's possession, otherwise than by the actual possession of the clerk or servant. In indictments for offences

under s. 16 of the M. S. Act, 1862, the property may be laid, either in the board by which the offender was appointed, or in the board or department for or on account of which the chattel, money, or valuable security was received.

(k) See *infra*, pp. 194—202, 231—232.

stores and cargo, whether on board the ship, in boats, or on shore (*l*). They must bring to their work competent skill and knowledge; and their first duty is a cheerful obedience to all lawful orders. They must, at all seasons, and under all difficulties, use their utmost exertions to preserve the ship and cargo. In the event of shipwreck, the right of self-preservation even is subordinate to this duty; for they are bound to remain by the ship, and the master, as long as he deems it possible that she may be saved (*m*).

To this general statement of the duties of the mariners it must be added that they are, in many senses, as has been said by Molloy (*n*), "the servants of the master, for whose miscarriages he must answer, and whom he may correct as the usage is at sea," and that their duties do not cease on the safe arrival of the ship in port, until they have assisted in the mooring of her, and in the delivery of the cargo (*o*).

BREACHES OF DUTY.

We proceed to consider more in detail the breach of these duties, by disobedience, desertion, mutiny, and other misconduct.

Disobedience.

Disobedience to a lawful command is not justified by an intemperate, or discourteous exercise of authority (*p*). Although seamen cannot be required to perform duties belonging to a character in which they have not contracted to serve, or requiring a skill which they have not professed, it is clear that, subject to this limitation, no refusal to perform any of the inferior services of the ship, or any portion of the work not generally allotted to the persons upon whom it is sought to be imposed, would be justifiable, even although the order might be harsh and, under the circumstances, unreasonable; for the Courts of law look with a necessary and wise indulgence upon the exercise of the powers

(*l*) See *infra*, p. 198, and the forms of agreement sanctioned by the Board of Trade, under the M. S. Act, 1854, s. 149; and the M. S. Act, 1872, s. 16; Appendix, "Forms," Nos. 24, 25, 25A, 25B, 25C. The forms of agreement issued under the earlier statutes were substantially similar with respect to the duties of the crew. The Board of Trade have issued forms of agreement applicable to ships engaged in the northern and southern whale fisheries.

(*m*) *The Neptune*, 1 Hagg. 236; *The*

Warrior, Lush. 481. See also *The Sappho*, L. R., 3 P. C. 690; and *The Florence*, 16 Jurist, 573.

(*n*) B. 2, c. 3, s. 13; see also Bac. Abr. tit. *Merchant and Merchandise*, E.

(*o*) See the judgment of Sir C. Robinson in *The Cambridge*, 2 Hagg. 243; see also *The Baltic Merchant*, Edw. 86, and the M. S. Act, 1854, s. 243. Illness is a sufficient excuse for leaving the ship before the delivery of the cargo. *The Test* (2), 3 Hagg. 307.

(*p*) *The Exeter*, 2 Rob. 261.

of the master, and lean towards the support of authority and discipline (*q*).

The powers of the master to punish for disobedience have been detailed in an earlier Chapter (*r*). The punishments imposed by the Merchant Shipping Act, 1854, in cases where the seaman has been engaged in accordance with the terms of the act, will be mentioned in a subsequent part of this Chapter (*s*).

Desertion, which, in many cases, includes disobedience, consists in an unlawful abandonment of the ship, or an unlawful absence from her with the intention of not returning, occurring during the voyage for which the seaman has contracted to serve (*t*). Refusing to return after quitting the ship by permission (*u*), or leaving her without waiting a reasonable time, when she cannot enter the port by reason of its crowded state, amounts also to desertion (*x*). If, however, the master violates the terms of the agreement by which the mariners are engaged, or employs the ship on a voyage that is illegal or involves a special risk beyond what was originally contemplated (*z*), the seamen are justified in leaving the ship, and their departure is not a desertion.

Under the 7 & 8 Vict. c. 112, every wilful absence without permission within twenty-four hours immediately preceding the sailing of the ship, either before the commencement of the voyage, or during its progress, amounted to a desertion. This act was, however, repealed by the Merchant Shipping Act Repeal Act, 1854 (17 & 18 Vict. c. 120); and the statute now in force, the Merchant Shipping Act, 1854, as amended by the Merchant Seamen Act, 1880, does not treat absence without leave within twenty-four hours of the ship's sailing as a desertion, but provides that this offence shall be punishable by forfeiture of a portion of the wages (*a*).

In inquiring whether or not a particular act amounts to a desertion, the *animus* of the mariner who commits it must be

(*q*) See the judgment in *The Exeter*, 2 Rob. 261; *Boyce v. Bayliffe*, 1 Camp. 60; *Lamb v. Burnett*, 1 C. & J. 291; and Dana's Seaman's Manual, Chap. ABLE SEAMEN, 156.

(*r*) *Ante*, p. 126.

(*s*) *Post*, p. 181.

(*t*) See the cases cited below, and the judgment of Mr. Justice Story in *Cloutman v. Tunison*, 1 Sumner (American) Rep. 373, and of Dr. Lushington in *The Two Sisters*, 2 W. Rob. 125.

(*u*) *The Bulmer*, 1 Hagg. 163; *The Jupiter*, 2 Hagg. 221.

(*x*) *The Pearl*, 5 Rob. 224.

(*z*) *The Minerva*, 1 Hagg. 347; *The Eliza*, ib. 182; *The George Home*, ib. 370; *The Countess of Harcourt*, ib. 248; *The Cambridge*, 2 ib. 243; *Burton v. Pinkerton*, L. R., 2 Ex. 340.

(*a*) The M. S. Act, 1854, s. 243; The M. S. Act, 1880, sects. 10, 12 (Appendix, pp. cccxxe, cccxxxh).

(1349)
 x Am Seaman well entitled
 whether more controllable
 or justify the seaman
 in refusing to serve.

considered, since acts of irregular absence may occur without coming within the terms by which this offence is defined; thus, where a sailor having gone ashore at a foreign port, got drunk, and overstayed his leave of absence, but there was no evidence of an intention or desire to quit the ship, the Court held that this was not a desertion (*b*). There are other acts, besides a deviation from the voyage agreed upon, which, when done by the master, have been held to justify a desertion, or rather to make that which would be otherwise a desertion a lawful quitting of the ship. Thus, where a reasonable request by a seaman to remain on shore to procure victuals was refused, and he remained notwithstanding, and returned the next morning to the ship, and offered to resume his duty, this was held not to be a desertion (*c*). So, a want of provisions, amounting to a substantial case of hardship, has been held to be a justification for leaving the ship (*d*); and desertion is excusable where the seaman cannot remain without risk to his personal safety by reason of the inhuman treatment and unreasonable severity and cruelty of the master (*e*). In a case where, although the men had grossly misconducted themselves, there was room for a belief that they might have misunderstood the words of the master, and have thought that they were discharged, the Court refused to construe their absence as an actual mutiny and desertion (*f*).

It has been held, independently of any statutory enactment in this respect, that if the master receives the mariner back the unlawful absence will be purged, at least so far as to prevent a forfeiture of the wages (*g*). Leaving the ship for the purpose of forthwith entering into the navy, is not a desertion (*h*); but a wrongful abandonment of the ship is not purged by an entry within twenty-four hours into the navy, not intended at the time of the desertion (*i*).

(*b*) *The Baling Grove*, 2 Hagg. 15. See also *Button v. Thompson*, L. R., 4 C. P. 330.

(*c*) *Sigard v. Roberts*, 3 Esp. 71.

(*d*) *The Castilia*, 1 Hagg. 59.

(*e*) *Limland v. Stephens*, 3 Esp. 269; *Edward v. Tretellick*, 4 E. & B. 59.

(*f*) *The Frederick*, 1 Hagg. 211.

(*g*) *Miller v. Brant*, 2 Camp. 590; *Beale v. Thompson*, 4 East, 546; *Train v. Bennett*, 3 C. & P. 3. By the just and merciful rule of the maritime law, if the mariner repented and sought to return to his duty, the master was

bound to receive him. See the judgment of Mr. Justice Story in *Cloutman v. Tunison*, 1 Sumner (American) Rep. 373.

(*h*) See the M. S. Act, 1854, s. 214. Any arrangement by which the wages are to be forfeited, if the seamen enter into the navy, is void. *Id.* And see sect. 215, as to the payment of wages and delivering up of the clothes and effects of seamen upon their volunteering into the navy.

(*i*) *The Amphitrite*, 2 Hagg. 403.

In cases of mutiny we have already seen that the master Mutiny. possesses a summary authority over the offenders, and that he may resort to force even although the mutiny be only threatened (*k*).

Numerous statutory provisions have been made for the punishment of the acts of misconduct of which the seamen may be guilty. The earlier statutes relating to this subject were repealed by the Merchant Shipping Act Repeal Act, 1854, and the principal act which is now in force is the Merchant Shipping Act, 1854 (*l*). This statute contains the following provisions (*m*).

STATUTORY
ENACTMENTS
FOR THE PRE-
SERVATION OF
DISCIPLINE.

By sect. 239, any master of or any seaman or apprentice belonging to any British ship who by wilful breach of duty or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction or serious damage of the ship, or tending immediately to endanger the life or limb of any person belonging to or on board of the ship, or who by wilful breach of duty or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction or serious damage, or for preserving any person belonging to or on board of the ship from immediate danger to life or limb, is guilty of a misdemeanor (*n*).

Breach or
neglect of
duty.

By sect. 243 of this act, as amended by sects. 10 and 12 of the Merchant Seamen Act, 1880, whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offences, he is liable to be punished summarily as follows (*o*) :

- (1.) For desertion he is liable to forfeit all or part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then

Desertion and
other offences.

(*k*) See *supra*, pp. 126, 127.

(*l*) See the M. S. Act, 1854, ss. 239—259, and the earlier statutes, now repealed—the 7 & 8 Vict. c. 112, and the 13 & 14 Vict. c. 93.

(*m*) The sections of the M. S. Act relating to discipline apply only to British ships. *Leary v. Lloyd*, 3 E. & E. 178. But see the M. S. Act, 1876, s. 37.

(*n*) To sustain an indictment under this section, it is not necessary to prove any actual loss, destruction, or damage.

Rex v. Gardner, 1 F. & F. 669.

(*o*) 43 & 44 Vict. c. 16, ss. 10, 12 (Appendix, pp. cccxxx, cccxxxA). In addition to the list of punishments mentioned in the text, the Board of Trade has sanctioned and published in pursuance of this act, a list of minor acts of misconduct and breaches of discipline, to which a loss of pay is attached. See Appendix, "Forms," Nos. 24, 25. If this list is adopted in the agreement it becomes obligatory.

earned. If the desertion takes place abroad, he is also liable, at the discretion of the Court (o), to forfeit all or any part of the wages or emoluments he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him :

- (2.) For neglecting or refusing, without reasonable cause, to join his ship, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship sailing from any port, either at the commencement or during the progress of any voyage, or for absence at any time without leave and without sufficient reason from his ship, or from his duty, not amounting to desertion or not treated as such by the master, he is liable to forfeit out of his wages a sum not exceeding the amount of two days' pay, and in addition for every twenty-four hours of absence either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute :
- (3.) For quitting the ship without leave after her arrival at her port of delivery and before she is placed in security, he is liable to forfeit out of his wages a sum not exceeding one month's pay :
- (4.) For wilful disobedience to any lawful command he is liable to imprisonment for any period not exceeding four weeks, with or without hard labour, and also, at the discretion of the Court, to forfeit out of his wages a sum not exceeding two days' pay :
- (5.) For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, he is liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour, and also, at the discretion of the Court, to forfeit for every twenty-four hours' continuance of such disobedience or neglect either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute :

(o) See *infra*, pp. 188—191.

- (6.) For assaulting any master or mate he is liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour :
- (7.) For combining with any other or others of the crew to disobey lawful commands, or to neglect duty or to impede the navigation of the ship or the progress of the voyage, he is liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour :
- (8.) For wilfully damaging the ship, or embezzling or wilfully damaging any of her stores or cargo, he is liable to forfeit out of his wages a sum equal in amount to the loss thereby sustained, and also, at the discretion of the Court, to imprisonment for any period not exceeding twelve weeks with or without hard labour (*p*) :
- (9.) For any act of smuggling of which he is convicted, and whereby loss or damage is occasioned to the master or owner, he is liable to pay to the master or owner a sum sufficient to reimburse the master or owner for the loss or damage; and the whole or a proportionate part of his wages may be retained in satisfaction or on account of this liability, without prejudice to any further remedy :

Upon the commission of any of the offences which have been just mentioned, it is also provided by sect. 244 of the Merchant Shipping Act, 1854, that an entry must be made in the official log-book (*q*) and signed by the master and also by the mate or one of the crew; and the offender, if still in the ship, must, before the next subsequent arrival of the ship at any port, or if she is at the time in port, before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and he may thereupon make any reply thereto which he thinks fit; and a statement that a copy of the entry has been so furnished or read over, and the reply made by the offender, must likewise be entered and signed in the manner mentioned above; and in any subsequent legal proceeding these entries must, if practicable, be produced or proved, and in default of their production or proof, the Court hearing the case may, at its discretion, refuse to receive evidence of the offence.

Entry of
offences in
official log.

(*p*) See 24 & 25 Vict. c. 97, ss. 42— ss. 13, 30.
47, 49 and 72; 24 & 25 Vict. c. 100,

(*q*) See Appendix, "Forms," No. 43.

Conveyance
on board
of deserters,
&c.

By sect. 10 of the Merchant Seamen Act, 1880, it is provided that whenever, either at the commencement or during the progress of a voyage, any seaman or apprentice neglects or refuses to join, or deserts from, or refuses to proceed to sea in any ship in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner, ship's husband or consignee may, with or without the assistance of the local police officers or constables, who are bound to give the same, if required, convey him on board; if, however, the seaman or apprentice so requires, he must first be taken before some Court capable of taking cognizance of the matters to be dealt with according to law; and if it appears to the Court before which the case is brought that the seaman or apprentice has been conveyed on board, or taken before the Court, on improper or on insufficient grounds, the master, mate, owner (*g*), ship's husband or consignee, is liable to a penalty not exceeding twenty pounds; but the infliction of this penalty is a bar to any action for false imprisonment (*r*).

By sect. 247 of the Merchant Shipping Act, 1854, as amended by the 10th and 12th sects. of the Merchant Seamen Act, 1880, whenever any seaman or apprentice is brought before any Court on the ground of his having neglected or refused to join or proceed to sea in any ship in which he is engaged to serve, or, of having deserted, or otherwise absented himself therefrom without leave, the Court may, if the master, or the owner or his agent requires it, cause the seaman or apprentice to be conveyed on board, for the purpose of proceeding on the voyage, or may deliver him to the master, or any mate of the ship, or the owner or his agent, to be by them so conveyed, and it may, in such case, order any costs and expenses properly incurred by or on behalf of the master or owner, by reason of the offence, to be paid by the offender, and, if necessary, to be deducted from any wages which he has then earned, or which, by virtue of his then existing engagement, he may afterwards earn.

By sect. 10 of the Merchant Seamen Act, 1880, it is provided, that if a seaman or apprentice intends to absent himself from

(*g*) An owner is not responsible for the misuse by his master of the power conferred by this section. *O'Neil v. Rankin*, 11 Sess. Cases (3rd series), 538.

(*r*) See Appendix, p. cccxxx. This section is substituted for the M. S. Act, 1854, s. 246. See 43 & 44 Vict.

c. 16, s. 12. Arrangements with respect to apprehending seamen deserting abroad have been made between the Queen and the governments of most foreign powers. See "Orders in Council," Appendix, pp. 29, 30; Supplementary Appendix, p. 171.

his ship or his duty, he may give notice of his intention, either to the owner or to the master of the ship, not less than forty-eight hours before the time at which he ought to be on board his ship; and, in the event of such notice being given, the Court shall not exercise any of the powers conferred on it by such of the provisions of sect. 247 of the Merchant Shipping Act, 1854, as have been referred to above.

Sect. 8 of the Merchant Seamen Act, 1880, provides that where any proceeding is instituted before any Court in relation to any dispute between an owner or master of a ship and a seaman or apprentice, arising out of or incidental to their relation as such, or instituted for the purpose, the Court, in its discretion, may rescind any contract between the owner or master and the seaman or apprentice, or any contract of apprenticeship, upon such terms as the Court may think just (s).

Power of Court to rescind contract of service.

Sect. 249 of the Merchant Shipping Act, 1854, provides that in all cases of desertion from a ship in a place abroad, the master must produce the entry of the desertion in the official log-book to the persons required to indorse on the agreement a certificate of the desertion; and these persons must thereupon make and certify a copy of the entry, and also a copy of the certificate of desertion; and if the person is a public functionary, he, and in other cases the master, must forthwith transmit these copies to the Registrar-General of Shipping and Seamen in England; and the registrar must, if required, cause them to be produced in any legal proceeding; and the copies, if purporting to be so made and certified, and certified to have come from the custody of the registrar, are evidence of the entries therein in any legal proceedings relating to the desertion (t).

Certificate of desertion abroad.

The Merchant Shipping Act, 1854, also provides by sect. 257, that any person who persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from duty, shall be liable to a penalty not exceeding ten pounds; and every person who wilfully harbours or secretes any seaman

Penalty for persuading to desert or harbouring deserter.

(s) Section 11 of this act provides that the Employers and Workmen's Act, 1875, shall apply to seamen and apprentices to the sea service. (See Appendix, p. cccclxxc.)

(t) See *supra*, p. 140. And see the M. S. Act, 1854, s. 279, sub-s. 2,

which provides that the indorsement shall be made at any foreign port where there is a British consular officer by such consular officer, and at any colonial port by the chief officer of customs.

Ships to which enactments as to discipline apply.

or apprentice who has deserted, or who has wilfully neglected or refused to join his ship, knowing the fact, or having reason to believe it, is liable to a penalty not exceeding twenty pounds (u).

The above-mentioned provisions with respect to the preservation of discipline are now, so far as they can be applied, extended by the Merchant Shipping Act, 1862, (s. 13,) to the following vessels:

Registered sea going ships exclusively employed in fishing on the coasts of the United Kingdom;

Sea going ships belonging to any of the three General Lighthouse Boards; and

Sea going ships being pleasure yachts (x).

By sect. 245 of the Merchant Shipping Act, 1854, every seafaring person whom the master of any ship is compelled to take on board and convey, under the authority of that act, or any other act, and every person who goes to sea in any ship without the consent of the master or owner, or other person entitled to give consent, is, so long as he remains in the ship, subject to the same laws and regulations for preserving discipline, and to the same penalties and punishments for offences constituting or tending to a breach of discipline, to which he would be subject if he were a member of the crew, and had signed the agreement.

Foreign ships.

The sections of the Merchant Shipping Act, 1854, which relate to discipline, do not apply to foreign ships (y); but if the government of a foreign state so desires, the Queen may, by Order in Council, declare that any of the provisions of the Merchant Shipping Acts shall apply to the ships of such state (z).

(u) As to the time within which proceedings must be taken under this section, see sect. 525, *infra*, p. 189, n. (f); and *Austin v. Olsen*, L. R., 3 Q. B. 208.

(x) Prior to this enactment the provisions of the M. S. Act, 1854, relating to discipline, did not apply to the vessels above mentioned. See the M. S. Act, 1854, s. 109. By sect. 13 of the M. S. Act, 1862, the whole of Part III. of the M. S. Act, 1854 (except sects. 136, 143, 145, 147, 149, 150, 151, 152, 153, 154, 155, 157, 158, 161, 162, 166, 170, 171, 231, 256, 279, 280, 281, 282, 283, 284, 285, 286 and 287) is extended to these ships. These excepted sections relate to masters' certificates, indentures of apprenticeship, the supplying of seamen without licence, agreements with seamen and their production, the shipping and discharge of seamen, the

appropriation of space on board for their accommodation, the deduction of fines from their wages, and the keeping of official logs.

(y) See *Leary v. Lloyd*, 3 E. & E. 178.

(z) The M. S. Act, 1876, s. 37. See also the Merchant Seamen Act, 1880 (Appendix, p. cccxxx), s. 5, providing that the provisions of s. 5 of that act with respect to the unauthorized boarding of ships may be applied by the Queen in Council to foreign ships in certain cases. [See "Order in Council," 2nd March, 1881.] The Foreign Deserters Act, 1852, provides, that where due facilities are given for recovering and apprehending seamen who desert from British merchant ships in the territories of any foreign power, the Queen may,

It must be remembered that subject to the effect of any regulations as to discipline contained in the agreement (a), the master has in all cases of offences by seamen a common law power of inflicting discretionary punishment, notwithstanding that the offenders may have rendered themselves liable to the specific statutory punishments mentioned above.

Punishment
for offences at
common law.

The effect of desertion and other acts of misconduct in causing a forfeiture of wages, will be considered more fully in a later part of this Chapter (b).

In cases of unseaworthiness, overloading, improper loading, or defective equipment, special protection to seamen charged with desertion has been given by the Merchant Shipping Acts, 1871 and 1873. Sect. 7 of the Act of 1871 provides that, whenever in any proceeding against a seaman or apprentice for desertion, or neglecting or refusing to join or to proceed to sea in his ship, or for being absent from or quitting it without leave, it is alleged by one-fourth of the seamen, or, if the number of the seamen exceed twenty, by not less than five, that the ship is by reason of unseaworthiness, overloading, improper loading, defective equipment, or for any other reason, not in a fit condition to proceed to sea, or that the accommodation is insufficient, the Court having cognizance of the case is to take such means as may be in their power to satisfy themselves concerning the truth or untruth of the allegation, and receive the evidence of the person or persons making it, and may summon any other witnesses whose evidence the Court may think it desirable to hear; the Court, if satisfied that the allegation is groundless, must proceed to adjudicate, but if not so satisfied must cause the ship to be surveyed. No seaman or apprentice, however, may apply for a survey unless previously to his quitting his ship he has complained to the master of the circumstances alleged in justification (c). For the purposes of such

RIGHT OF SEAMEN CHARGED WITH DESERTION TO APPLY FOR SURVEY IN CASE OF UNSEAWORTHINESS, &c.

by order in council, declare that deserters from the ships of the foreign power (not being slaves) within the Queen's dominions or the territories of the East India Company, may be apprehended and carried on board their ships. And upon the publication of such an order, the English authorities are bound to aid in the apprehension of the foreign deserters. The 15 Vict. c. 26, ss. 1 and 2. Arrangements have been made under this statute

with almost all the maritime nations except the United States. See Appendix, "Orders in Council," pp. 29, 30. As to deserters from Portuguese ships, see the 12 & 13 Vict. c. 25; and 39 & 40 Vict. c. 20, s. 2.

(a) See *supra*, p. 181, n. (c).

(b) *Post*, p. 226.

(c) The Court has also under the same section power to call in any of the surveyors appointed by the Board of Trade, or, if one of these cannot be

survey, a surveyor shall have all the powers of an inspector appointed by the Board of Trade under the Merchant Shipping Act, 1854.

The costs (if any) of the survey are to be determined by the Board of Trade according to a scale of fees to be fixed by them (*e*), and are to be paid in the first instance out of the Mercantile Marine Fund (*f*), and are to be paid by the persons demanding the survey out of their wages, or by the master or owner, according to the result.

Naval Court
may direct
survey.

By sect. 8 of the same act any naval court (*g*) may, if they think fit, direct a survey of any ship which is the subject of an investigation held before them, and such survey is to be made in the same way, and the surveyor who makes the same has the same powers, as if the survey had been directed by a competent Court in the course of proceedings against a seaman or apprentice for desertion or a kindred offence.

Sect. 9 of the Act of 1873 provides that, if a seaman or apprentice belonging to any ship is detained on a charge of desertion or any kindred offence, and if upon a survey it is proved that the ship is not in a fit condition to proceed to sea, or that her accommodation is insufficient, the owner or master of the ship is liable to pay such compensation for the detention of the seaman or apprentice as the Court may award.

PROCEDURE
AND JURISDIC-
TION WITH
RESPECT TO
OFFENCES.

The 518th section of the Merchant Shipping Act, 1854, which is therein made applicable to all places in her Majesty's dominions (*h*), except Scotland (*i*), provides that every offence

procured, some other impartial surveyor to assist and report. See Appendix, p. cccxvi. By the American law a right is given to the mate and majority of the crew to stop the ship after the voyage has begun, but before the land is left, if they deem her unsafe or not duly provided, and to cause her to be examined and repaired, if necessary, at the nearest or most convenient port. If the complaint appears to have been without foundation, the expenses and reasonable damages are to be deducted from the wages of the crew. 3 Kent, Com. 177 (ed. 1873). The common law did not imply from the relation of shipowner and seaman any warranty that the ship was seaworthy. *Couch v. Steel*, 3 E. & B. 402. But see now the M. S. Act. 1876, s. 5, and *post*, p. 197.

(*e*) See Appendix, "Forms," No. 55.

(*f*) See further as to the fees payable in respect of surveys under the M. S. Acts, the M. S. Act, 1872, s. 13, and the M. S. Act, 1876, s. 39. As to the Mercantile Marine Fund, see M. S. Act, 1854, ss. 417—430.

(*g*) See the M. S. Act, 1854, s. 260, and *post*, p. 191.

(*h*) By sect. 2 of the act, her Majesty's dominions are defined to mean her Majesty's dominions strictly so called, all territories under the government of the East India Company, and all other territories governed by charter or licence from the crown or parliament.

(*i*) The statute in sects. 530—543 contains provisions regulating the procedure to be adopted in Scotland.

by the act made punishable by not exceeding six months' imprisonment, or by any penalty not exceeding 100*l.*, shall in England and Ireland be prosecuted summarily before any two or more justices; as to England in the manner directed by the Summary Jurisdiction Act, 1848, or any acts to be passed for the like purposes (*k*); and as to Ireland by the 14 & 15 Vict. c. 93, or any such like subsequent acts, and that all the provisions of such acts shall be applicable to the prosecution of the offences in question as if the same were in the Merchant Shipping Act, 1854, stated to be offences in respect of which two or more justices possess jurisdiction to convict summarily or to make a summary order (*l*). The same section provides that every offence declared by the act to be a misdemeanor shall be punishable by fine or imprisonment, with or without hard labour (*m*), or be deemed one of the offences made punishable under the Merchant Shipping Act, 1854, by not exceeding six months' imprisonment, with or without hard labour, or by a penalty not exceeding 100*l.*, and as such may be prosecuted summarily in the manner above mentioned.

Summary
proceedings
before jus-
tices.

With respect to all offences under the act committed in any British possession (*n*), the section further provides that such offences shall be punishable in any Court, or by any justices of

(*k*) See the 11 & 12 Vict. c. 43, the 20 & 21 Vict. c. 43 (enabling a special case to be stated by a court of summary jurisdiction), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which, saving as therein provided, is to be construed as one with the 11 & 12 Vict. c. 43, and provides *inter alia* that an adult person charged with an offence for which he is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may claim to be tried by a jury (sect. 17), and that an appeal to a Court of general or quarter sessions shall lie in every case where a person is sentenced by a Court of summary jurisdiction to imprisonment without the option of a fine, and the sentence is not adjudged for a failure to comply with an order for the payment of money (ss. 31 and 32). The 65th section of the M. S. Act, 1862, provides, that nothing in the 3rd section of the 20 & 21 Vict. c. 63 (requiring appellants to enter into recognizances where a special case is stated), except so much thereof as relates to the payment of fees to justices' clerks,

shall be deemed to apply to any proceeding under the directions of the Board of Trade, or under the provisions of the M. S. Acts.

(*l*) All proceedings for instituting summary proceedings under the M. S. Acts must be taken, except in certain excepted cases where a longer time is given to parties out of the jurisdiction, within six months after the commission of the offence or the time when the cause of complaint arose; the M. S. Act, 1854, s. 525. See also *Austin v. Olsen*, L. R., 3 Q. B. 208.

(*m*) The section also provides that the Court trying the case may order payment of the same costs and expenses as are allowed by statute or ordinance in other cases of misdemeanor.

(*n*) Sect. 2 of the act defines "British possession" to mean any colony, plantation, island, territory or settlement within her Majesty's dominions, and not within the United Kingdom; and by the M. S. Colonial Act, 1869, 32 Vict. c. 11, s. 7, for the purpose of the M. S. Acts, Canada is to be deemed a British possession.

the peace or magistrate having jurisdiction over offences of a like character, or as may be determined by any act or ordinance of such possession, and also contains provisions providing for an appeal to the appropriate Court of general or quarter sessions in all cases of summary convictions in England under the section where the sum adjudged to be paid exceeds 5*l.* or the period of imprisonment adjudged exceeds one month, and declares how and in what manner the appeal shall be prosecuted.

Appeal from
summary
conviction.

Provisions are contained in the 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879, under which any person aggrieved who desires to question a conviction, order, determination or other proceeding of a Court of summary jurisdiction in England, on the ground that it is erroneous or in excess of jurisdiction, may appeal to a superior Court (*o*).

Sect. 519 of the Merchant Shipping Act, 1854, enacts that any stipendiary magistrate shall have full power to do alone whatever two justices of the peace are by the act authorized to do.

It is provided by sect. 520 of the Merchant Shipping Act, 1854, that for purposes of jurisdiction all offences under the act are to be deemed to have been committed, and all causes of complaint to have arisen, either where actually committed or where the complaint arose, or in any place in which the offender may be (*p*); and by sect. 521, the jurisdiction of which any Court, justice of the peace, or other magistrates possess either by statute or at common law over the adjoining districts is extended over all ships and boats lying or passing off any coast, or being in or near any bay, channel, lake, river or navigable water, and over all persons on board or belonging to such ships or boats.

Naval Courts
abroad.

The Merchant Shipping Act, 1854, contains provisions enabling any officer in command of a Queen's ship on a foreign

(*o*) See *supra*, p. 189, n. (*k*).

(*p*) See also the M. S. Act, 1855, s. 21, which provides, that any Court in the Queen's dominions may try any British subject found within its jurisdiction, and charged with any offence committed on board a British ship on the high seas, or in any foreign harbour, if the Court would have had cognizance of the offence if committed within its ordinary jurisdiction. A similar power is given by the same act

to try any person, not being a British subject, for any offence committed on board a British ship on the high seas. As to the construction of this section, see *Reg. v. Lopez*, 7 Cox, C. C. 431; 27 L. J., M. C. 48. See also the 24 & 25 Vict. c. 97, ss. 42—49, 72, and the 12 & 13 Vict. c. 96, which provides for the prosecution, in the colonies, of offences committed within the jurisdiction of the Admiralty.

station, or, in the absence of such officer, a consular officer, to summon a Court, termed a Naval Court, to inquire into matters of complaint requiring immediate investigation, or into the cause of the wreck or abandonment of any British ship, or whenever the interest of the owners of the ship or cargo appear to require it. The act defines the constitution and powers of Naval Courts, and lays down general rules with respect to their functions and mode of action (*q*).

By sect. 263, these Courts may discharge any seaman from his ship, and may order his wages or any part of them to be forfeited; they may direct the same to be either retained as compensation by the owner, or to be paid into the Exchequer. These tribunals have also power to decide any questions as to wages, fines or forfeitures arising between any of the parties to the proceedings, and they may order that any costs incurred by the master or owner in procuring the imprisonment of any seaman or apprentice in a foreign port, or in his maintenance whilst so imprisoned, shall be paid out of the wages then or subsequently earned. They have also authority over the costs of the proceedings, and may order any person making a frivolous or vexatious complaint to pay compensation for any loss or delay thereby occasioned. The costs and compensation may be recovered in the same manner as wages, or, if the case admits, may be deducted from the wages (*r*).

The 18th section of the Merchant Shipping Act, 1855, confers powers on any naval court summoned under the Merchant Shipping Act, 1854 (*s*), to hear any complaint touching the conduct of the master or any of the crew of any ship, to try such master or any of such crew for any offences against the Merchant Shipping Act, 1854, which, if committed in the United Kingdom, could have been prosecuted summarily before two justices, and to inflict the like punishments as such justices could then have inflicted (*t*).

(*q*) See the M. S. Act, 1854, ss. 260—266.

(*r*) The M. S. Act, 1854, s. 263. All the orders duly made by these Courts are, in any subsequent legal proceedings, conclusive as to the rights of the parties. These sections with reference to Naval Courts, which occur in the third part of the M. S. Act, 1854, are not excepted in sect. 13 of

the M. S. Act, 1862, which extends to sea-going yachts the greater portion of Part III. of the M. S. Act, 1854.

(*s*) Sect. 260.

(*t*) In cases where an offender is sentenced to imprisonment, the proceedings must be confirmed by the senior naval or consular officer present. The M. S. Act, 1855, s. 18.

Offences on
high seas and
abroad.

By sect. 267 of the Merchant Shipping Act, 1854, all offences against property or person committed in or at any place either ashore or afloat out of the Queen's dominions by any master, seaman or apprentice who at the time when the offence was committed is, or within three months previously had been, employed in any British ship, are to be treated and punished as if committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution may be directed to be paid as in cases of offences within that jurisdiction.

Apart from the provisions of the statute law, seamen, whatever may be their nationality, serving on board British ships, are amenable to the criminal law of England, whilst on the high seas, or in the rivers of a foreign state, where the tide ebbs and flows, and great ships do go (s). And by sect. 11 of the Merchant Shipping Act, 1867, if any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any Court of Justice in her Majesty's dominions, which would have had cognizance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid.

By sect. 268 of the Merchant Shipping Act, 1854, the following rules are to be observed with respect to offences committed on the high seas or abroad:

Inquiries be-
fore consular
officers.

- (1.) Whenever any complaint is made to a British consular officer of any of the offences in question, or of any offence on the high seas having been committed by any master, seaman or apprentice belonging to any British ship, the consular officer may inquire into the case upon oath, and may, if the case so requires, take any steps in his power for the purpose of placing the offender under necessary restraint, and of sending him as soon as prac-

(s) *Reg. v. Anderson*, L. R., 1 C. C. 161; *R. v. Seberg*, *ib.* 264. See also *The Queen v. Keyn*, 2 Ex. D. 63. It is moreover now declared by the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 2, that any offence committed by a person, whether he is or is not a subject of her Majesty, on the open sea within the territorial waters of her Majesty's dominions, is an offence within the

jurisdiction of the Admiralty, although it may have been committed on board of or by means of a foreign ship. In the case, however, of a person not a subject of the Queen, proceedings can only be taken after the consents of the authorities specified in the act have been obtained. See Appendix, p. cccxviii. See also the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 46).

ticable in safe custody to the United Kingdom, or to any British possession in which there is a Court capable of taking cognizance of the offence, in any ship belonging to the Queen or to any of her subjects, to be there proceeded against according to law:

- (2.) For this purpose the consular officer may order the master of any ship belonging to any subject of the Queen, bound to the United Kingdom or to such British possession as is mentioned above, to receive and afford a passage and subsistence during the voyage to any offender and to the witnesses, so that the master be not required to receive more than one offender for every one hundred tons, or more than one witness for every fifty tons of the ship's registered tonnage; and the consular officer must indorse upon the agreement of the ship any particulars with respect to any offenders or witnesses sent, as the Board of Trade may require:
- (3.) Every master must on the ship's arrival give the offender into the custody of a police officer or constable, who must take him before a magistrate, who must deal with the matter as in cases of offences committed upon the high seas:

The same section provides, that masters who refuse to convey offenders or witnesses in the manner above mentioned, shall be liable to a penalty not exceeding fifty pounds; and the expenses of imprisoning the offender and conveying him and the witnesses, are to be treated as part of the costs of the prosecution, and paid as costs incurred on account of distressed seafaring British subjects (t).

The general rights of the crew are correlative to their duties. Their obedience and skill entitle them to remuneration and protection, to humane, just and consistent treatment, to proper food, if procurable, and to care in the event of sickness (u). RIGHTS OF
THE CREW.

(t) The M. S. Act, 1854, provides, that when any death happens on board any foreign going ship, the cause of it must be inquired into by the mercantile marine office superintendent, on the arrival of the ship at the port of discharge; and, subject to certain limitations, the depositions of witnesses who cannot be found are made evidence in all legal proceedings. See ss. 269,

270; *Reg. v. Anderson*, 11 Cox, C. C. 154; and *Reg. v. Stewart*, 13 Cox, C. C. 296. This last-mentioned provision does not render admissible in evidence depositions taken in the United Kingdom, and tendered in evidence there.

(u) See *Limland v. Stephens*, 3 Esp. 269; *The Castilia*, 1 Hag. 59.

ENGAGEMENT
OF SEAMEN.

By sect. 146, the Board of Trade may grant licences to enable persons to engage or supply seamen or apprentices for merchant ships in the United Kingdom. These licences are granted upon such terms and are revocable upon such conditions as the Board thinks proper (x).

By sect. 147, if any person not licensed as aforesaid, not being the owner, master, or mate of the ship, or a person *bond fide* the servant and in the constant employment of the owner, or a superintendent of a mercantile marine office, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he is liable to a penalty not exceeding twenty pounds. A similar penalty is incurred (in addition to the forfeiture of the licence in case the offence is committed by any licensed person) by the employment for this purpose of any person who is not entitled to act in the engaging or supplying of seamen under the statute, and by the knowingly receiving or accepting to be entered on board of any ship any seaman or apprentice who has been engaged or supplied contrary to the provisions of the act.

By sect. 148, any person who demands or receives either directly or indirectly from any seaman or apprentice, or from any person seeking employment as a seaman or apprentice, or from any one on his behalf, any remuneration whatever for providing him with employment other than the fees authorized by the statute, is made liable to a penalty not exceeding five pounds (y).

Debts incurred by seamen after engagement.

By sect. 234, no debt exceeding five shillings incurred by any seaman after he has engaged to serve is recoverable, until the service agreed for is concluded (z).

Agreements with the crew.

We will now consider a very important portion of the system established for the protection of the crew by the Merchant Shipping Act, 1854; namely, its provisions as to the agreements with seamen.

The regulations of the statute on this subject are in many

(x) The licences now in force issued under this section are very few in number. A list of the persons holding such licences is given in the Mercantile Navy List for each year.

(y) The sects. 147, 148 of the M. S. Act, 1854, apply to all sea going British

ships, wherever registered; see s. 109. See the M. S. Act, 1862, s. 13.

(z) This section does not extend to apprentices. See the interpretation clause, s. 2. Sales of and charges on the wages and salvage due to seamen and apprentices made in anticipation are invalid; *ib.* s. 233.

respects similar to those which were contained in the earlier acts (t), and are as follows:—

By sect. 149, the masters of all ships (u) (except ships of less than eighty tons registered tonnage, exclusively employed in trading between different ports on the coasts of the United Kingdom) are bound to enter into an agreement with every seaman (x) whom they carry to sea from any port in the United Kingdom as one of the crew. This agreement must be in a form sanctioned by the Board of Trade (y), must be dated at the time of the first signature of it, and must be signed by the master before any seaman signs it (z).

The agreement must also contain the following particulars as terms thereof:—

- (1.) The nature, and, as far as practicable, the duration of the intended voyage or engagement (a):
- (2.) The number and description of the crew, specifying how many are engaged as sailors (b):

(t) See the 8 & 9 Vict. c. 116, and the Mercantile Marine Act, 1850 (13 & 14 Vict. c. 93). The first instance of any regulation in England requiring an agreement in writing with the seamen, is a bye-law of the Trinity House (approved by Chancellor Jeffries), made in 1687. By this bye-law it is ordered that "every commander of a ship hiring any mariner or seaman to sail with him on any voyage to sea, do take in writing under the said seaman's hand, upon what condition he is entertained; and that he doth submit himself to the bye-laws of the Trinity House." See the charters, &c. of the Trinity House, collected and printed, 1825.

(u) By sect. 13 of the M. S. Act, 1862, registered sea going fishing ships employed on the coast, sea going ships belonging to the General Lighthouse Boards, and sea going pleasure yachts, are excepted from this section.

(x) This word includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship. See the M. S. Act, 1854, s. 2. If any seaman, on or before being engaged, wilfully and fraudulently makes a false statement of the name of his last ship, or of his own name, he is liable to a penalty not exceeding 5*l.*, which may be deducted from his wages. *Id.* s. 255.

(y) See the M. S. Act, 1854, s. 8,

giving the Board of Trade power to alter the instruments required under the part of the act relating to masters and seamen; see also sect. 10. As to the effect of an agreement not according to the authorized form, see *Ridley v. The Plymouth Baking Co.*, 2 Ex. 711.

(z) These agreements are exempt from the Stamp Act. See the M. S. Act, 1854, s. 9; the 33 & 34 Vict. c. 97, s. 3, and Sched. "Agreement."

(a) The M. S. Act, 1873, provides that the agreement, instead of stating the nature and duration of the intended voyage, may state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend. See the decisions on the 31 Geo. 3, c. 39, as to the sufficiency of the description of the voyage. That act required that the agreement should state for what voyage the seaman had contracted. *The George Home*, 1 Hagg. 370; *The Minerva*, *ib.* 352; *The Westmoreland*, 1 W. Rob. 216.

(b) Where, in consequence of the desertion of some of the crew in harbour, a ship became so short-handed that to proceed to sea would be dangerous to life, it was held that the seamen were justified in refusing to obey the orders of the master to put to sea. *Hartley v. Ponsonby*, 7 E. & B. 872; see also *The Araminta*, 1 Spk. 229.

- (3.) The time at which each seaman is to be on board, or to begin work :
- (4.) The capacity in which each seaman is to serve :
- (5.) The amount of wages which each seaman is to receive (*d*).
- (6.) A scale of the provisions which are to be furnished to each seaman.
- (7.) Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties may agree to adopt (*e*).

Every agreement must be so framed as to admit of stipulations, to be adopted at the will of the master and seamen, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law (*f*). It is also provided by the same section, that if the master of any ship belonging to any British possession has an agreement with his crew made in due form according to the law of the possession to which the ship belongs, or in which her crew were engaged, and engages single seamen in the United Kingdom, such seamen may sign the agreement so made, and it shall not be necessary for them to sign an agreement in the form sanctioned by the Board of Trade.

(*d*) See, as to agreements by owners or masters of British vessels engaged in fishing off the coast of the United Kingdom whereby the persons employed may be remunerated by a share of the profits of the adventure, the M. S. Act, 1873, s. 8.

(*e*) The effect of one of the earlier acts, the 2 Geo. 2, c. 36, was to render invalid agreements for wages not in writing. *White v. Wilson*, 2 B. & P. 116; *Eleworth v. Woolmore*, 5 Esp. 84. The later acts, however, are differently worded, and now, although a penalty is incurred if the agreement is not in writing, a verbal agreement would probably be binding. Where a written agreement exists, the ordinary rule applies, that it must be taken to represent the final contract between the parties; and terms which are verbally agreed upon before, or at the time of the writing, but which are not contained in it, are not binding. *Meres v. Ansell*, 3 Wils. 275; *Goss v. Lord Nugent*, 5 B. & Ad. 58; *The Isabella*, 2 Rob. 241. See also *Abrey v. Cruz*, L. R., 5 C. P. 37. If the agreement is ambiguous it is to

be construed in favour of the seaman. *The Nonpareil*, Br. & L. 355.

(*f*) As to what stipulations are ambiguous and contrary to the policy of the statute, see *Frazer v. Hutton*, 2 C. B., N. S. 512, a decision on the corresponding section of the 13 & 14 Vict. c. 93. It has been held that an agreement for the purpose of breaking a blockade, is not contrary to law. *The Helen*, L. R., 1 A. & E. 1. Where a change of ownership in a British vessel takes place by sale in this country while she is in a foreign port, the contract under which the crew were shipped is (*quoad* the new owner) at an end. Where, however, one of the crew continued to serve on board the vessel at the request of an agent of the new owner, without entering into any fresh articles, and afterwards and before the termination of the contemplated voyage, quitted with the consent of the captain who had been appointed by the new owner, it was held that he might recover, against such new owner, wages *pro ratâ*. *Robins v. Fowler*, 4 C. B., N. S. 778.

Forms of agreement have been sanctioned and issued by the Board of Trade in pursuance of these provisions (*g*).

Sect. 182 of the Merchant Shipping Act, 1854, also provides, that every stipulation in any agreement inconsistent with any of the provisions of the act, or by which any seaman consents to abandon his right to wages in case of the loss of the ship, or to abandon any right to salvage, is to be wholly inoperative (*h*). It is also provided, by sect. 214 of this act, that all stipulations in any agreement whereby any seaman is declared to incur any forfeiture or loss in case he enters into the navy, are void. Void stipulations.

The above provision of the Merchant Shipping Act, 1854, as to agreements to abandon any right of salvage, is declared (by the Merchant Shipping Act, 1862) not to apply to the case of any stipulation made by the seamen belonging to any ship which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by that ship to other ships (*i*).

The Merchant Shipping Act, 1876, s. 26, requires the master of every British ship, except ships under eighty tons register employed solely in the coasting trade, ships employed solely in fishing, and pleasure yachts, to enter a copy of the statement as to the distance between the load line required by that section and the lines of the decks of the ship, in the agreement with the crew before it is signed by any member of the crew, and no superintendent of any mercantile marine office may proceed with the engagement of the crew until this entry is made. Entry respecting load line in agreement.

The Merchant Shipping Act, 1876, provides by sect. 5, that Implied obligation as to seaworthiness of ship.

(*g*) See Appendix, "Forms," Nos. 24, 25, 25A, 25B, 25C. The Board of Trade have also issued forms of agreement applicable to ships engaged in the northern and southern whale fishery.

(*h*) This section also provides that no seaman is, by any agreement, to forfeit his lien on the ship, or to be deprived of any remedy for the recovery of his wages. All stipulations as to the allotment of wages, made at the commencement of the voyage, must be inserted in the agreement. See sect. 168. The 8th section of the M. S. Act, 1873, enacts that agree-

ments legalized by that Act shall be valid, notwithstanding sect. 182 of the M. S. Act, 1854. Sales of and charges on the wages and salvage due to seamen made in anticipation are invalid. The M. S. Act, 1854, s. 233.

(*i*) The M. S. Act, 1862, s. 18. These provisions do not fetter the discretion exercised by the Admiralty Division as to such agreements. See *The Pride of Canada*, Br. & L. 208; *The Pensacola*, Br. & L. 310; *The Ganges*, L. R., 2 A. & E. 370; see also *The Rosario*, 2 P. D. 41. And see *post*, Chap. X., SALVAGE.

in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same. Nothing, however, in this section is to subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable.

Authorized
form of agree-
ment.

By the forms of agreement now in use, the crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the master, or of any person who may lawfully succeed him, and of their superior officers, in everything relating to the ship, and her stores and cargo, whether on board, in boats, or on shore; and in consideration of this service the master agrees to pay to the crew as wages the sums expressed in the agreement, and to supply them with provisions according to a scale which must be contained in the agreement.

These forms also provide that any embezzlement, or wilful or negligent destruction of any part of the ship's cargo or stores, is to be made good to the owner out of the wages of the offender; and that if any person enters himself as qualified for a duty which he proves incompetent to perform, his wages are to be reduced in proportion to his incompetency; and that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he is to represent the same to the master or officer in charge of the ship in a quiet and orderly manner, and the latter must thereupon take such steps as the case may require.

Blanks are left in these forms to be filled up with any other stipulations to which the parties may agree, and which are not contrary to law, and for the incorporation in the agreement, by

reference, of some regulations for maintaining discipline comprising a scale of punishments for minor offences which have been sanctioned and published by the Board of Trade, in pursuance of this statute (*k*).

These forms have been adapted by slight variations to the cases of vessels engaged in the northern and southern whale fisheries, in which the seamen are usually paid by a share in the adventure (*l*).

The master is bound at the commencement of any voyage or engagement to cause a legible copy of the agreement (omitting the signatures) to be placed on board, so as to be accessible to the crew (*m*).

In the case of all foreign going ships (a term which includes ships employed in trading or going between a place in the United Kingdom and a place beyond the coasts of the United Kingdom, the islands of Guernsey, Jersey, Sark, Alderney and Man, and the continent of Europe between the Elbe and Brest inclusive (*n*), in whatever part of the Queen's dominions they may be registered) the following rules with respect to agreements are laid down by the Merchant Shipping Act, 1854. Sect. 150 provides, that—

Agreement with crew of foreign going ship.

- (1.) Every agreement made in the United Kingdom (except in the case of agreements with substitutes, which are specially provided for) must be signed by each seaman in the presence of a superintendent of a mercantile marine office (*o*) :
- (2.) The superintendent must cause the agreement to be read over and explained to each seaman, or must otherwise ascertain that each seaman understands the same before he signs it, and he must attest each signature :
- (3.) When the crew is first engaged the agreement must be signed in duplicate, and one part must be retained by the superintendent, and the other part must contain a special place or form for the descriptions and signatures

(*k*) See Appendix, "Forms," Nos. 24, 25, 25A, 25B, 25C.

(*l*) Arrangements of this kind do not constitute a partnership. *Wilkinson v. Fraser*, 4 Esp. 182; *Dry v. Boswell*, 1 Camp. 329; see also *Pott v. Eyton*, 3 C. B. 32, where the same principle was recognized.

(*m*) The M. S. Act, 1854, s. 166.

(*n*) Sect. 2.

(*o*) The "shipping masters" referred to in the M. S. Act, 1854, are now termed "superintendents of mercantile marine offices." See *ante*, pp. 176, 176.

of substitutes or persons engaged subsequently to the first departure of the ship, and it must be delivered to the master :

- (4.) In the case of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship's putting to sea by death, desertion, or other unforeseen cause, the engagement must, when practicable, be made before a duly appointed superintendent of a mercantile marine office; and whenever it cannot be so made, the master must, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen; and the seamen must thereupon sign the same in the presence of attesting witnesses.

Running
agreements
for foreign
going ships.

By sect. 151, in the case of foreign going ships making voyages averaging less than six months in duration, running agreements with the crew may be made to extend over two or more voyages, but they must not extend beyond the following thirtieth of June, or thirty-first of December, or the first arrival of the ship at her port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival; and every person entering into such an agreement, whether he is engaged upon the first commencement of it or otherwise, must enter into and sign it in the manner required for other foreign going ships; and if discharged in the United Kingdom, he must be discharged in the manner required for the discharge of seamen belonging to other foreign going ships.

By sect. 152, the master of any foreign going ship for which a running agreement is made must, upon every return to a port in the United Kingdom before the final termination of the agreement, discharge or engage before the superintendent of the mercantile marine office at that port any seaman whom he is required by law to discharge or engage; and the master is bound upon every such return to indorse on the agreement a statement either that no such discharges or engagements have been made or are intended to be made before the ship again leaves port, or that all such discharges or engagements have been duly made as required by the act. The master is also bound to deliver the agreement so indorsed to the mercantile

marine office superintendent, and the superintendent must sign an indorsement on the agreement to the effect that the provisions of the act have been complied with, and re-deliver it to the master. Any master who wilfully makes a false statement in such indorsement incurs a penalty not exceeding twenty pounds (*p*).

In the case of home trade ships (a term which includes ships employed in trading or going within the following limits :—the United Kingdom, the islands of Guernsey, Jersey, Sark, Alderney and Man, and the continent of Europe between the Elbe and Brest inclusive) the Merchant Shipping Act, 1854, contains the following provisions :—

Agreement with crew of home trade ship.

By sect. 155, crews or single seamen may, if the master thinks fit, be engaged before a superintendent in the manner directed by the act with respect to foreign going ships ; and in every case in which the engagement is not so made, the master must, before the ship puts to sea, if practicable, and if not, as soon after as possible, cause the agreement to be read over and explained to each seaman, and the seaman must thereupon sign it in the presence of an attesting witness.

By sect. 156, where several home trade ships belong to the same owner, the agreement with the seamen may be made by the owner instead of by the master, and the seamen may be engaged to serve in any two or more of the ships, if the names of the ships and nature of the service are specified in the agreement ; subject, however, to this exception, all the provisions of the act, as to ordinary agreements for home trade ships, are applicable to agreements made in the manner last mentioned.

In the case of home trade ships of more than eighty tons burthen, sect. 162 provided that no agreement might extend beyond the next following 30th of June, or 31st of December, or the first arrival of the ship at her final port of destination in the United Kingdom after that date, or the discharge of the crew

(*p*) These sections do not apply to vessels belonging to the Lighthouse Boards and seagoing pleasure yachts. The M. S. Act, 1862, s. 13. In cases in which running agreements are made, the duplicate agreement retained by the superintendent upon the first engagement of the crew must be either transmitted to the Registrar-General of Shipping and Sea-

men immediately, or be kept by the superintendent until the expiration of the agreement, as the Board of Trade may direct. The M. S. Act, 1854, s. 153. See also sect. 154, as to the mode of determining the fees to be paid on the engagement and discharge of seamen belonging to ships which have running agreements, and Appendix, "Forms," No. 55, note (*a*).

tion in the official log, and sending a report of it to the Board of Trade. The master is liable to a penalty not exceeding 20*l.*, if he does not thereupon provide proper or sufficient provisions or water, or if he uses any of the articles which have been objected to in the manner mentioned above (*t*).

By sect. 222, however, if the officer to whom the complaint has been made certifies that there was no reasonable ground for it, each of the persons complaining is liable to forfeit to the owner a sum not exceeding a week's wages.

Compensation
in cases of
short allow-
ance.

It is provided by sect. 223, that if, during the voyage, the allowance to any seaman of any of the provisions stipulated for in the agreement is reduced, he shall receive compensation; if the reduction is by any quantity not exceeding one-third, he is entitled by way of compensation to a sum not exceeding four-pence a day. This compensation is raised to eight-pence a day when the reduction exceeds one-third. If it is shown that any of the provisions are or have been during the voyage bad in quality and unfit for use, the seaman is also entitled to receive in regard of the bad quality a sum not exceeding one shilling a day, according to the time of its continuance. These sums are recoverable as wages; they are not to be allowed if the reduction in the provisions is by way of punishment in pursuance of any regulations in the agreement, nor for any time during which the seaman wilfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully confined for misconduct either on board or on shore.

If, moreover, it appears that the provisions which have been reduced could not be procured or supplied in proper quantities, and that proper and equivalent substitutes were provided, the Court before which the case is brought may modify or refuse the compensation as it may think just (*u*).

Medicines
and medical
stores, &c.

Provisions were contained in the Merchant Shipping Act, 1854 (*x*), with respect to medicines, medical stores, and anti-

(*t*) The same section provides that the report if produced out of the custody of the Board of Trade is to be received as evidence in any legal proceeding. See also sect. 232, as to the right of seamen to go ashore for the purpose of making complaints, *post*, p. 209.

(*u*) See as to the allowance of compensation to the crew, when, in consequence of the unexpected length of the voyage, they have been put on short commons, *The Josephine*, Swa. 152, 2 Jur., N. S. 1148.

(*x*) See sects. 224, 227.

scorbutics (*y*). These have been repealed, and the matter is now dealt with by the Merchant Shipping Act, 1867, as follows:—

- By sect. 4 (1) the Board of Trade is empowered to issue and publish from time to time suitable scales of medicine and medical stores (*z*), and prepare or sanction books of instruction for dispensing them (*a*).
- (2.) The owners of every ship navigating between the United Kingdom and any place out of the same must provide and keep on board a supply of medicines and medical stores in accordance with the scale, and a copy of a book containing instructions:
 - (3.) No lime or lemon juice (*b*) is to be deemed fit and proper to be taken on board ship, for the use of the crew or passengers, unless it has been obtained from a bonded warehouse for and to be shipped as stores; and it may not be so obtained unless it is shown by a certificate under the hand of an inspector appointed by the Board of Trade, to be proper for use on board ship, such certificate to be given upon inspection of a sample; nor unless it contains fifteen per cent. of proper and palatable proof spirits, to be approved by such inspector or by the proper officer of Customs, and to be added before or immediately after the inspection; nor unless it is packed in such bottles at such time and in such manner and so labelled as the Commissioners of Customs direct (*c*).
 - (4.) The master or owner of every such foreign-going ship (except those bound to European ports or to ports in the

(*y*) Medical inspectors, whose duty it was to inspect the medicines required to be provided under the Act of 1854, medical stores, &c. were appointed by the Board of Trade and local marine boards. These officers might object to any articles that were not in accordance with the regulations in the act; and when any such objection had been made, the ship could not clear for sea without a certificate from an inspector that the matters objected to had been set right. See s. 226 of the M. S. Act, 1854, which has not been repealed.

(*z*) The scale of medicines and stores which has been issued by the Board of Trade under this act will be found in the Appendix, "Forms," No. 39. As to the scales of medicines and medical

stores issued under the Passenger Acts, see Appendix, "Forms," Nos. 36, 37, and Ch. XI., PASSENGERS.

(*a*) The book sanctioned by the Board of Trade is *The Ship Captain's Medical Guide*, published by Simpkin, Marshall & Co.

(*b*) This supply of acids is for the purpose of preventing the scurvy, a disease which often results from a diet of salt provisions unaccompanied by vegetable food.

(*c*) The spirit to be added (which may not be plain or raw spirit) is relieved from duty; but after its addition the deposit of the juice in the warehouse is subject to the customs regulations as to the delivery of ships stores. As to the regulations issued under the section, see App. p. cclxxvi, note (*l*).

Mediterranean Sea, and also except such ships or classes of ships bound to ports on the eastern coast of America north of the thirty-fifth degree of north latitude, and to any islands or places in the Atlantic Ocean north of the same limit, as the Board of Trade may from time to time exempt from this enactment (*d*) must provide and cause to be kept on board a sufficient quantity of lime or lemon juice from the warehouse duly labelled, and the labels are to remain intact until twenty-four hours at least after the ship has left her port of departure on her foreign voyage, or a sufficient quantity of such other anti-scorbutics, if any, of such quality and composed of such materials, and packed and kept in such manner as her Majesty by Order in Council may from time to time direct.

- (5.) The master of such ship must serve out the lime or lemon juice with sugar (such sugar to be in addition to any sugar required by the articles) or other such anti-scorbutics to the crew so soon as they have been at sea for ten days, and during the remainder of the voyage, except during such time as they are in harbour and are there supplied with fresh provisions; the lime or lemon juice and sugar is to be served out daily at the rate of an ounce each per day to each of the crew, and to be mixed with a due proportion of water, or the other anti-scorbutics, if any, at such times and in such quantities as her Majesty by Order in Council from time to time directs.
- (6.) If at any time when such lime or lemon juice or anti-scorbutics is served out any seaman or apprentice refuses or neglects to take it, an entry must be made in the official log, and signed by the master and mate or some other of the crew, and also by the surgeon if any (*e*).

(*d*) The Board of Trade have exempted from the requirements of this enactment all ships bound from any port in the United Kingdom to ports on the eastern coast of America situate between the 35th and 60th degree of north latitude; and also all ships bound to any islands or places in the Atlantic Ocean situate within those limits, but subject to the proviso that the exemption shall not extend (1) to ships which being bound to any place within the limits aforesaid may be also bound

to any place out of those limits, or (2) to ships bound to any part of the coast or islands of Greenland situate within the limits aforesaid.—*Instructions to Mercantile Marine Superintendents*, August, 1879.

(*e*) It does not appear that any Order in Council has been issued under this section. If the medicines, medical stores, book of instructions, lime or lemon juice, sugar, or anti-scorbutics required by the act are not provided, packed and kept on board as required,

By sect. 225 of the Merchant Shipping Act, 1854, the master is also bound to keep on board proper weights and measures, and to allow them, whenever any dispute may arise about the quantities, to be used in the presence of a witness in serving out the provisions and articles supplied to the crew (f). Weighing provisions, &c.

Every foreign going ship having on board one hundred persons or upwards must, by sect. 230, carry a duly authorised physician, surgeon, or apothecary (g). Medical officer for foreign going ships.

the owner or master incurs a penalty not exceeding 20*l.*, unless he can prove that the non-compliance with the provisions was not caused through any inattention, neglect or wilful default on his part; and if the lime or lemon juice and sugar or other anti-scorbutics are not served out in the case and manner hereinbefore directed, or if entry is not made in the official log as required, the master for each default incurs a penalty not exceeding 5*l.*, unless he can prove that the non-compliance did not arise through any neglect, omission, or wilful default on his part; and if it is proved that some person other than the master or owner is in default, such other person is liable to a penalty not exceeding 20*l.*

By sect. 5 of the M. S. Act, 1867, any person who manufactures, sells or keeps or offers for sale any medicines or medical stores which are of bad quality, for each such offence incurs a penalty not exceeding 20*l.*

By sect. 6 of the same act, in any British possession out of the United Kingdom the governor or officer administering the government for the time being, subject to the laws of such possession, has power to make regulations concerning the supply within such possession of lime or lemon juice and anti-scorbutics for the use of ships; and any lime or lemon juice or anti-scorbutics duly supplied in accordance with any such regulations is to be deemed to be fit and proper for the use of ships.

(f) The 7 & 8 Vict. c. 112, which is now repealed, contained a provision requiring that ships navigating between the United Kingdom and places out of the same should keep constantly on board a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea voyages, and in accordance with a scale issued by the lords of the admiralty, and a penalty was imposed

by this statute on the owner for any neglect of this provision. It was held, after the passing of this act, that it imposed on the shipowner the duty of keeping on board the supply of medicines required by the act, and that a sailor who had sustained a private injury by reason of the breach of this statutory duty might bring an action against the owner and claim damages from him, although a specific punishment by penalty was fixed by the statute for the breach of that duty so far as related to the public. See the 7 & 8 Vict. c. 112, s. 18; and *Couch v. Steel*, 3 E. & B. 402. The authority of the case, however, was much shaken by what fell from Lord Cairns and the other judges of the Court of Appeal in *Atkinson v. The Gateshead and Newcastle Waterworks*, 2 Ex. D. 441. The enactments of the M. S. Act, 1854, which are mentioned above, with reference to provisions and medicines, and which occur in Part III. of that act, are not excepted in sect. 13 of the M. S. Act, 1862, which extends that part of the earlier act (except certain specified sections) to pleasure yachts, fishing coasting vessels, and ships belonging to the three General Light-house Boards.

(g) The statute expressly provided that the provisions of the Passengers' Act, 1852 (15 & 16 Vict. c. 44), concerning the carriage of medical practitioners in passenger ships, should not be affected by these regulations. This act has now, however, been repealed by the Passengers Act, 1855, s. 1. As to the provisions now in force with regard to medical officers on board emigrant ships clearing under the Passenger Acts, see Chap. XI. *PASSENGERS*, and Appendix, "Orders in Council," p. 64. The 36th section of the Medical Registration Act, 1858 (21 & 22 Vict. c. 90), provides that no person required to be registered under that act shall hold any appointment as a physician, sur-

Medical examination of seamen.

By the Merchant Shipping Act, 1867, sect. 10, provisions are enacted by which the appointment and remuneration of medical inspectors of seamen, who are to examine seamen applying for employment and report as to their fitness for duty at sea are regulated (*h*).

Expenses in cases of illness or death of crew.

The following are the rules established by the Merchant Shipping Act, 1854, with respect to the expenses attendant on the illness or death of the master or any of the crew:—

By sect. 228, if the master or any seaman or apprentice is hurt in the service of the ship the expenses of the necessary surgical and medical advice, attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back to the United Kingdom, or to a port in the British possession in which he was shipped, together with the expense of conveyance or of burial, are to be borne by the shipowner without any deduction from the wages. In like manner the owner must bear the expense of all medicines and surgical or medical advice and attendance given to any master, seaman or apprentice whilst on board the ship as well as the expense of their temporary removal from the ship on account of illness, and for the purpose of preventing infection, or otherwise for the convenience of the ship; and he must also provide during such temporary absence the necessary advice, attendance, subsistence and medicines (*i*).

geon or other medical officer either in the military or naval service, or in emigrant or other vessels, unless he be so registered. This provision is, however, not to repeal any of the provisions of the Passengers Act, 1855.

(*h*) See App. "Forms," Nos. 40 and 41.

(*i*) These provisions are wider than those which were contained, in this respect, in the 7 & 8 Vict. c. 112, which only spoke of sickness caused by a hurt in the service of the ship. The M. S. Act, 1854, however, adopts the more liberal rule of the general maritime law of Europe under which the expense of curing a seaman who falls sick during the voyage, is a charge upon the ship. *Laws of Oleron*, Art. 7; *Laws of Wisbuy*, Art. 19. This rule has been adopted, with some exceptions, into the American law. See the cases collected 3 Kent, Com. 184 (ed. 1873), and *The George*, 1 Sumner (American), Rep. 151. By the French law, if the seamen fall ill during the voyage, or

are wounded in the service, they are still entitled to their wages, and the owners must bear the expense of their treatment as well in these cases as where they are wounded in defence of the ship; but it is otherwise where the injury occurs on shore whilst they are absent without leave. See *Code de Commerce*, Art. 262, 263, 264. In Scotland it has been held that the shipowners are not responsible to the seamen for personal injury caused by the negligence of the master; *Leddy v. Gibson*, 11 Sess. Cas. (3rd series), 304. But see *Wilson v. Merry*, L. R., 1 Sc. App. 326; *Murphy v. Smith*, 19 C. B. N. S. 361; and *Ramsay v. Quinn*, L. R. (Irish), 8 C. P. 322. It has been held in Scotland that an injury received by a seaman from an occurrence causing the wreck of his ship is "an injury received in the service of the ship to which he belongs;" *The Lord Advocate v. Grant*, 1 Sess. Cas. (4th series), 447. The 138th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), pro-

In all other cases the owner is entitled to deduct from the wages of any seaman or apprentice any reasonable expenses incurred by the owner in respect of his illness, or in respect of his burial if he dies in the owner's service (*k*).

The Merchant Shipping Act, 1867, by sect. 7 further provides that if it is shown that any seaman or apprentice who is ill has, through the neglect of the master or owner, not been provided with proper food and water according to his agreement, or with such accommodation, medicines, medical stores, or anti-scorbutics as are required by the Acts of 1854 and 1867, then, unless it can be shown that the illness has been produced by other causes, the owner or master is liable to pay all expenses properly and necessarily incurred by reason of such illness (not exceeding in the whole three months wages), either by such seaman himself or by her majesty's Government, or any officer of her majesty's Government, or by any parochial or other local authority on his behalf, and such expenses may be recovered in the same way as if they were wages duly earned. This enactment does not operate, however, so as to affect any further liability of any owner or master for such neglect, or any remedy which a seaman already possesses.

But by sect. 8 of the Merchant Shipping Act, 1867, where a seaman is by reason of illness incapable of performing his duty, and it is proved that such illness has been caused by his own wilful act or default, he shall not be entitled to wages for the time during which he is by reason of such illness incapable of performing his duty.

Independently of these statutory provisions, the master has no authority to pledge the credit of the owner for medicines and attendance furnished to members of the crew who have

vides that whenever, in compliance with any regulations issued by the Local Government Board under that act, any poor law medical officer performs any medical service on board any vessel his charge for such service shall be paid by the master on behalf of his owners, together with any reasonable expense for the treatment of the sick. See Supp. App. p. 164. As to Scotland, see "The (Scotland) Public Health Act, 1867," 30 & 31 Vict. c. 101, s. 54.

(*k*) These sections, which occur in Part III. of the M. S. Act, 1864,

are not excepted in sect. 13 of the M. S. Act, 1862, which extends the greater portion of that part to sea-going fishing coasting vessels, ships of the three General Lighthouse Boards and sea-going pleasure yachts. Consular officers, or other persons acting on behalf of the Crown, who pay expenses in respect of the illness or injury of seamen, may claim them from the master, and if not paid, they are a charge on the ship, and may be recovered from the owner as a debt. The M. S. Act, 1854, s. 229.

been hurt in the ship's service, unless it appear that it was necessary to do this for the due prosecution of the voyage (*l*).

Rights of crew with respect to space, air, &c.

The Merchant Shipping Act, 1854, also contained other provisions for the benefit of the crew which it is not necessary to mention in detail. Thus, sect. 231 fixed the sleeping space to be allowed to each seaman, and required that it should be kept free, properly constructed and caulked, and well ventilated.

This section is repealed by sect. 3 of the Merchant Shipping Act, 1867, but sect. 9 of that act contains more complete and stringent provisions for effecting the same object (*m*).

Right of crew to go on shore to make complaint.

And by sect. 232 it is provided, that any seaman or apprentice shall be allowed to go on shore to make complaint against the master or any of the crew.

DISCHARGE OF THE CREW.

Discharge before the commencement of the voyage.

It is provided by sect. 167 of the Merchant Shipping Act, 1854, that any seaman who has signed an agreement and is afterwards discharged before the voyage commences, or one month's wages are earned, is entitled (if the discharge was without his consent, and without fault on his part justifying it) to receive from the master or owner, in addition to any wages earned, due compensation for the damage thereby caused to him, not exceeding, however, one month's wages; and this compensation may be recovered as if it were wages duly earned.

Discharge by order of Naval Court.

We have seen that by the 263rd section of the Merchant Shipping Act, 1854, seamen may be discharged by the order of any Naval Court before which an investigation under the 260th section of the act has been held (*n*).

Discharge out of the Queen's dominions.

Protection against abandonment abroad.

The same statute also contains, in sect. 205, provisions for the purpose of protecting seamen from being wrongfully discharged or left behind abroad. Thus, it is provided that whenever any British ship is transferred or disposed of at any place out of the Queen's dominions, and any seaman or apprentice belonging thereto does not, in the presence of some British consular officer,

(*l*) *Organ v. Brodie*, 10 Ex. 449.

(*m*) See Appendix, p. cclxxvii.

(*n*) See *supra*, p. 191. Whenever practicable any order made by a Naval

Court must be entered in the official log of the ship to which the parties to the proceedings before the Court belong. See the M. S. Act, 1854, s. 264.

or, if there is no such consular officer there, in the presence of one or more respectable British merchants residing at the place, and not interested in the ship, signify his consent in writing to complete the voyage, and also, whenever the service of any seaman or apprentice belonging to any British ship terminates at any place out of the Queen's dominions, the master must give to each seaman or apprentice a certificate of discharge, in a form sanctioned by the Board of Trade. In the case of any certificated mate, whose certificate he has retained, he must also return it to him. The master must also, besides paying the wages to which the seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship, bound to the port in the Queen's dominions at which he was originally shipped, or to such other port in the United Kingdom as may be agreed upon by him, or he must furnish the means of sending him back to such port, or provide him with a passage home, or deposit with the consular officer or merchants such a sum as may be by such officer or merchants deemed sufficient to defray the expenses of his subsistence and passage home. The consular officer or merchants must endorse upon the agreement of the ship the particulars of the payment, provision or deposit; and if the master refuses or neglects to comply with these requirements, the expenses, if defrayed by the consular officer, or by any other person, are made (unless the seaman or apprentice has been guilty of barratry), a charge upon the ship, and upon the owner for the time being; and they may be recovered, with costs, at the suit of the consular officer or other person. If the expenses have been allowed to the consular officer out of the public moneys, they may be recovered as debts due to the Crown, and if they have been defrayed by the seaman or apprentice they are recoverable as wages due to him.

It is also provided, by sect. 206 of the statute, that any master, or other person belonging to a British ship, who wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind in any place, on shore or at sea, in or out of the Queen's dominions, any seaman or apprentice belonging to the ship, before the completion of the voyage for which he was engaged, or the return of the ship to the United Kingdom, shall be guilty of a misdemeanor.

And, by sect. 207, the following acts, if committed by the

master of any British ship, amount to a misdemeanor (*p*), and may be inquired into summarily on the spot by the functionaries whose sanction or certificate is required for the discharge of seamen abroad :—

- (1.) The discharge of any seaman or apprentice, in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing, indorsed on the agreement, of some public superintendent of a mercantile marine office, or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place :
- (2.) The discharge of any seaman or apprentice at any place out of the Queen's dominions, without previously obtaining the sanction, indorsed as above mentioned, of the British consular officer there, or (in his absence) of two respectable merchants resident there :
- (3.) The leaving behind any seaman or apprentice at any place situate in any British possession abroad, on any ground whatever, without previously obtaining a certificate in writing, indorsed as above mentioned, stating the fact and the cause of it, whether the cause be unfitness or inability to proceed to sea, or desertion or disappearance :
- (4.) The leaving behind any seaman or apprentice at any place out of the Queen's dominions, on shore or at sea, on any ground whatever, without previously obtaining the certificate, indorsed as mentioned above, of the British consular officer there, or (in his absence) of two respectable merchants, if there be any such at or near the place where the ship then is (*q*).

Whenever seamen or apprentices are left on shore abroad under a certificate of unfitness or inability, the master is bound,

(*p*) See *supra*, p. 189.

(*q*) Upon any trial for discharging or wrongfully leaving behind any seaman, it must be proved by the person charged with the offence that the sanction or certificate mentioned in the text was obtained, or that it was impracticable to obtain it; the *M. S.*

Act, 1854, s. 208. By the French law, the captain can in no case discharge a seaman in a foreign country. Code de Commerce, Art. 270. By the American law, the master has the right to discharge a seaman for just cause, and to put him ashore in a foreign country. 3 Kent Com. 183 (ed. 1873).

under sects. 209 and 210 of this statute, to deliver to the functionaries mentioned above a full and true account of all the wages which are due, which must be then paid either in money or by a bill on the shipowner (*r*).

The Merchant Shipping Act, 1862, provides that the payment of wages required by sect. 209 of the Merchant Shipping Act, 1854, as above mentioned, shall, whenever it is practicable, be made in money and not by bill; and where payment is made by bill drawn by the master, the owner of the ship is liable to pay the amount of the bill to the holder or indorsee of it. It is not necessary in any proceeding on the bill against the owner, to prove that the master had authority to draw it, and any bill purporting to be drawn in pursuance of the section above referred to, and to be indorsed as therein required, is receivable in evidence if produced out of the custody of the Board of Trade or of the Registrar-General of Shipping and Seamen, or of any superintendent of a mercantile marine office; any indorsement on any such bill, moreover, which purports to be made in pursuance of the section referred to, and to be signed by one of the functionaries mentioned in it, is receivable in evidence and to be deemed *prima facie* evidence of the facts stated in the indorsement (*s*).

By sect. 211 of the Merchant Shipping Act, 1854, the governors, consular officers and other officers of the Queen in foreign countries are bound to provide for the subsistence of all seamen or apprentices, being subjects of the Queen, who have been shipwrecked, discharged, or left behind at any place abroad, whether from a merchant or Queen's ship, or who have been engaged to serve in a ship belonging to a foreign power, or to the subject of a foreign state, and who are in distress in any place abroad, until they are able to provide them with a passage home, and for this purpose they must cause the seamen or apprentices to be put on board some ship belonging to a British subject bound to any port of the United Kingdom, or to the British possession to which they belong (as the case may require), which is in want of men to make up its complement, and in default of any such ship they must provide them with a passage home as soon as possible in some ship belonging to a British subject bound as mentioned above. And in places where there

Relief of distressed seamen abroad.

(*r*) *The Rajah of Cochin*, Swa. 475.

(*s*) The M. S. Act, 1862, s. 19.

are no such governors or officers these powers may be exercised by any two resident British merchants. The particulars of the case must be indorsed on the agreement of the ship on board of which the seamen are put, and the expenses of their subsistence may be paid out of any monies granted by Parliament for the relief of distressed British seamen.

By sect. 212 of this act, the masters of all British ships bound as aforesaid are obliged, under heavy penalties, to afford a passage and subsistence to all seamen or apprentices not exceeding one for every fifty tons burthen, whom they are required to take on board, under the circumstances mentioned above. They must provide the seamen or apprentices during the passage with a proper berth or sleeping place effectually protected against sea and weather; and they are subsequently entitled to receive out of the fund already mentioned such sums *per diem* in respect of the subsistence and passage of the seamen or apprentices as the Board of Trade may appoint (†).

Doubts having been entertained whether under the last-mentioned sections of the Merchant Shipping Act, 1854, with reference to the relief and sending home of distressed seamen, any power existed of making regulations and imposing conditions for the prevention of desertion and misconduct, and the undue expenditure of public money; it is provided by sect. 22 of the Merchant Shipping Act, 1862, that the claims of seamen to be relieved or sent home in pursuance of any of the above sections or any of them shall be subject to such regulations and dependent on such conditions as the Board of Trade may from time to time make or impose; and no seaman shall have any right to demand to be relieved or sent home except in the cases and to the extent provided for by these regulations and conditions.

By sect. 213 of the Merchant Shipping Act, 1854, whenever any seaman or apprentice belonging to any British ship is discharged or left behind at any place out of the United Kingdom, without a full compliance on the part of the master with all the provisions mentioned above, and becomes distressed and is relieved under the statute, and whenever any British subject, after having been engaged by any person (whether acting as principal or agent) to serve in any ship belonging to any foreign power,

(†) This section mentions *British ships*; the previous section refers to ships belonging to British subjects.

or to the subject of any foreign power, becomes distressed and is relieved as is mentioned above, the wages due to the seaman or apprentice, and the expenses of his subsistence, necessary clothing, conveyance home (or burial, if he dies before reaching home), constitute a charge upon the ship, whether British or foreign, to which he belonged; and the Board of Trade may in the Queen's name (besides suing for any penalties which may have been incurred) sue for the wages and expenses, with costs, either from the master of the ship or from the owner thereof for the time being, or, in the case of an engagement for service in a foreign ship, from the master or owner, or from the person by whom the engagement was made (*u*).

These provisions have been extended by the Merchant Shipping Act, 1855 (18 & 19 Vict. c. 91). Sect. 16 of this act provides, that the Board of Trade may issue instructions as to the relief of distressed seamen and apprentices under the sections mentioned above, and determine by these instructions in what cases this relief shall be given (*x*). All the powers mentioned above, of recovering expenses incurred with respect to distressed seamen and apprentices, are also extended by the last-mentioned act to any expenses incurred by any foreign government for these purposes and repaid by the English government, and to cases in which seamen and apprentices are conveyed home in foreign ships. The provisions of the Merchant Shipping Act, 1854, which are above mentioned, are, moreover, extended by this statute to seamen and apprentices not subjects of the Queen, but reduced to distress in foreign parts by having been shipwrecked, discharged or left behind from a British ship; subject,

(*u*) These sums are recoverable either as other Crown debts, or in the same way as wages due to the seamen; and the production of the account of wages furnished under the act, and proof of payment by the Board of Trade or Paymaster-General, is sufficient evidence that the seaman was relieved, conveyed home, or buried at the expense of the Crown. The M. S. Act, 1854, s. 213. It is observable that the provisions of Part III. of the M. S. Act, 1854, with reference to the protection of seamen against abandonment abroad (ss. 205—213) are not excepted in s. 13 of the M. S. Act, 1862, which extends the whole of Part III. of the M. S. Act, 1854, except certain specified sections, to re-

gistered sea-going coasting ships employed in fishing, sea-going ships belonging to the General Lighthouse Boards, and sea-going pleasure yachts. It is obvious, however, that no question with reference to these provisions can, under ordinary circumstances, arise in the case of any of the ships above mentioned, except sea-going yachts.

(*x*) The power of the Board of Trade (under s. 22 of the M. S. Act, 1862) to make regulations for the prevention of desertion and misconduct, and the undue expenditure of public money in these cases, has been already mentioned, *ante*, p. 214.

however, to such modifications in the case of foreigners as the Board of Trade may direct.

Relief of
Lascar sea-
men.

The 544th section of the Merchant Shipping Act, 1854, and the 23rd section of the Amendment Act of 1855, enables the master or owner of any ship or his agent to enter into contracts under the conditions mentioned in the sections with Lascars or natives of India, binding them in certain cases to serve as seamen in ships bound to or from the United Kingdom; and the 16th section of the Merchant Shipping Act Repeal Act, 1854, makes provision against the master of any ship in which any native either of Asia or Africa or the South Sea or Pacific Islands has been brought to the United Kingdom as a seaman leaving him in distress in this country (s).

WAGES.

Before treating of the general statutory provisions relating to the discharge of seamen at the conclusion of their engagement, it is convenient to consider the subject of wages.

Ordinary con-
tract, and its
incidents.

In former times, advantage was frequently taken of the improvidence and ignorance of seamen to induce them to bind themselves by unjust and oppressive contracts as to wages. The legislature interfered from time to time to check this abuse, and the Court of Admiralty, in its character of a Court of Equity, relieved as far as it could against these contracts; but, as these are now matters of history only, and the earlier decisions of the Courts of law turn chiefly upon acts of parliament worded differently from the existing statutes, we will pass, at once, to the modern statutes which regulate contracts of hire with seamen (a).

Wages begin either when the seaman commences work, or at the time specified in the agreement for his commencing it, or for his presence on board, whichever may first happen (b), and

(c) The 17 & 18 Vict. c. 120, s. 16, App. p. clxvii. As to the relief and conveyance home of Lascars and other natives of the Indian Empire who are found destitute in the United Kingdom, see 4 Geo. 4, c. 80, ss. 25—28, 30—34, and the M. S. Act, 1855, s. 22.

(a) The early acts will be found mentioned in sect. 1 of the 5 & 6 Will. 4, c. 19. The decisions upon them are collected in Abbott on Shipping, pp. 645—652.

(b) The M. S. Act, 1854, s. 181. At common law, if the ship was not sent on the projected voyage, the seamen were entitled to be paid for the time during which they were employed on board. *Wells v. Osman*, 2 Ld. Raym. 1044; *Mills v. Gregory*, Sayer, 127. Where a seaman was discharged after the articles had been signed, but before the commencement of the voyage, it was held that he was entitled to sue in the Court of Admiralty for wages if the voyage had been prosecuted. *The City of London*,

any seaman who has signed an agreement and is discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part, justifying the discharge, and without his consent, is entitled, as we have already seen (c), in addition to the wages earned, to compensation for any damage caused to him, not exceeding one month's wages; and he may recover this compensation, as if it were wages duly earned (d).

The forms of agreement now in use in pursuance of the Merchant Shipping Act, 1854, contain, as we have seen (e),

1 W. Rob. 88. If the voyage was abandoned, the remedy was only at common law. *Ib.*; see also *The Debreesia*, 3 W. Rob. 37.

(c) *Ante*, p. 210.

(d) The M. S. Act, 1854, s. 167. The French Code has settled with great precision the mode in which seamen are to be indemnified if the voyage is, by reason of any act of the owners, master, or freighters, not prosecuted. If the intended voyage is given up before the ship sails, the seamen who are engaged for the voyage, or by the month, must be paid for the time during which they have been employed about the ship, and they are also entitled to retain any money that may have been advanced to them. If nothing has been paid in advance, they are to receive a month's wages as an indemnity, or, if they were hired for the voyage, that proportion of their wages which a month bears to the average length of the voyage. If this abandonment of the adventure occurs after the commencement of the voyage, the seamen hired by the voyage are entitled to the whole of the wages stipulated, and those who were hired by the month must be paid all that they have earned, and also, as an indemnity, half of the full amount of their wages, computed according to the probable duration of the voyage. In every event, the mariners are to be paid a sum to cover their expenses back to the port from which the vessel sailed, unless an engagement is procured for them on some ship returning there. If the voyage is prevented, before the ship sails, by an interdiction of commerce with the port of destination, or by an order of government, (*arrest of princes or embargo*), the seamen are only entitled to be paid for the days of actual employment; if this occur after the commencement of the voyage, they are to be paid, in cases of interdiction, (and it would seem also in cases of actual stoppage caused by the government putting an

end to the voyage,) for the time only of actual service; these being cases of *vis major*, in which it is just that all the parties should bear a proportion of the loss. In cases of mere delay by the government, those seamen who are hired by the month are to receive at the rate of half their monthly wages during the delay, and those who are hired by the voyage are to receive no increase of pay. If the voyage is prolonged (owing to the ship proceeding to a more distant port than that originally intended for her destination, or to her going to her port of destination by a longer voyage than that which was agreed upon), the seamen hired by the voyage are not entitled to refuse to serve, but their wages are to be increased in proportion to the increased length of the voyage; but no reduction is to be made if the ship is discharged voluntarily at a port nearer than the port of original destination. It appears, however, that if such a discharge takes place by reason of perils of the sea, or of any other cause over which the owners and master have no control, the seamen hired by the voyage are to be subject to a proportionate reduction of their wages. See the Code de Commerce, Arts. 252 to 256. Where the agreement is that the men are to be remunerated by sharing in the freight, or in the profits of the adventure, no compensation or payment is to be made to them if the voyage is prevented, shortened, or lengthened by cases of *vis major*; but if the alteration is caused by an act of the freighters, owners, or master, they are entitled to be compensated. See *Ib.* Art. 252 to 257, with Rogron's Commentary. These rules have been adopted in Belgium, and, with some modifications, in Holland. In America, the principles sanctioned by them have been acted upon in some cases. See 3 Kent, Com. 188 (ed. 1873).

(e) See *ante*, p. 198.

a stipulation that any embezzlement, or wilful or negligent destruction of any part of the ship's cargo or stores, shall be made good to the owner out of the wages of the offender; and that if any person enters himself as qualified for a duty which he proves incompetent to perform, his wages are to be subject to a reduction proportioned to his incompetency.

Allotment of wages by notes.

The Merchant Shipping Act, 1854, also provides by sect. 168, that all stipulations for the allotment by notes of any part of the wages of seamen during their absence, shall, if made at the commencement of the voyage, be inserted in the agreement, and shall state the amounts and times of payment.

In cases where a seaman desires that any part of his wages not exceeding one half shall be paid during his absence to his wife or other relation, or in favour of a savings bank, it is obligatory on the owner or master to insert a stipulation for that purpose in the agreement. These notes must be in the form sanctioned by the Board of Trade (*f*), and may, by sect. 169 of the Merchant Shipping Act, 1854, be proceeded on, in the County Court or summarily (*g*), either by the relations mentioned in that section, or, if the note is in favour of a savings bank, by such persons as the Board of Trade may direct; and the amount may be recovered with costs from the owner, or any agent who has authorized the drawing of the notes (*h*). In these proceedings the seamen are to be presumed to be duly earning their wages, unless the contrary is shown by any evidence which the Court may, in its discretion, think sufficient. No wife of any seaman, however, who deserts her children, or so misconducts herself as to be undeserving of support from her husband, can recover wages on any allotment note (*i*). Sect. 3 of the Merchant Seamen Act, 1880, provides for the time and mode of payment of these notes.

(*f*) See Appendix, "Forms," No. 26; and No. 26A, note (*b*). With respect to "advance notes," by which an owner or master agrees to repay a sum advanced to a seaman, provided the ship sails, see *M'Kune v. Joynton*, 5 C. B., N. S. 218. These notes are made illegal by the M. S. Act, 1880, s. 2 (Appendix, p. cccxxxv). See also 8 Geo. 1, c. 24, s. 7.

(*g*) See also the M. S. Act, 1854, ss. 188, 519. The mode of proceeding summarily in these cases is to claim the wages before two justices or a stipendiary magistrate acting in or near to the place at which the person upon whom

the claim is made, is, or resides. *Ib.*

(*h*) See the M. S. Act, 1880, s. 3 (Appendix, p. cccxxxv). A registered owner who has demised his ship and parted with all control over her is not liable under this provision. *Meikleroid v. West*, 1 Q. B. D. 428.

(*i*) Sects. 167, 168, and 169 of the M. S. Act, 1854, which occur in the third part of the act, are not excepted in s. 13 of the M. S. Act, 1862, which extends to sea-going yachts, certain fishing vessels, and ships belonging to the three General Lighthouse Boards, the greater part of Part III. of the earlier act.

It was by the common law of England an implied condition of the contract for wages that they were to be dependent upon the earning of freight by the ship. This ancient rule, which was generally expressed by saying that *freight is the mother of wages*, was, even before the modern statutory alterations, subject to several exceptions. Thus, where the loss of freight proceeded from the misconduct of the master, or of the owner, the maritime law considered the innocent seamen to be still entitled to their wages (*k*). So, no arrangement between the owners and charterers not agreed to by the seamen, by which the payment of the freight was made to depend on the accomplishment of the entire voyage out, and in, affected their right to wages; and where a vessel set out on a seeking voyage in search of freight and obtained none, the wages were nevertheless payable (*l*).

Common law rule that wages were dependent upon freight.

The old rule, that freight is the mother of wages, implied not only that freight must be earned in order that the claim for wages might arise, but also that if freight was earned, the mariners were, under ordinary circumstances, entitled to be paid (*m*). In earlier times the Courts of common law and the

(*k*) *Malynes' Lex Merc.* 105; *Molloy*, B. 2, c. 3, s. 7. In *Eaken v. Thom*, 5 Esp. 6, Lord Ellenborough ruled at Nisi Prius, that where the abandonment of the voyage arose from the ship not being seaworthy the sailor could not recover his wages, but must sue in a special action on the case. See also *Fewings v. Tisdale*, 1 Ex. 295.

(*l*) See the American authorities cited 3 Kent Com. 190, and the judgments of Lord Stowell in *The Neptune*, 1 Hagg. 232, and of Sir J. Nicholl in *The Lady Durham*, 3 id. 202. The exceptions which existed formerly are thus stated in one of Mr. Justice Story's judgments: "If the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage; in all these cases the mariners are entitled to wages, notwithstanding no freight has been earned." *The Saratoga*, 2 Gallison's (American) Rep. 175.

(*m*) The ground of this rule is mentioned in an early case, where it is said,

"Car si les mariners avera leur gages in ceux cases ils ne voil use leur indeavors ne hazard leur vies pur salve le neife." *Anon.*, 1 Sid. 179; *Hernaman v. Bowden*, 3 Burr. 1844; 1 Beawes' *Lex Merc.* 160. This rule is recognized, to some extent, by the law of France, Belgium, and Holland. By the French law, if the ship and goods are taken, or totally lost, no wages are due, but the mariners are entitled to retain any money that may have been advanced to them. If, however, portions of the ship are saved, the wages of those seamen who are hired by the voyage, or by the month, must be paid, after payment of salvage, out of the remains of the ship which they have saved; and if the value of the parts saved is not sufficient for this purpose, or goods only are saved, the seamen are then to have a claim on the freight. And further, in whatever way the seamen may be hired, they are entitled to be paid for the time during which they exert themselves to save the ship and goods, for the shipwreck is deemed to dissolve the original engagement, and the mariners are then considered to stand in the position of ordinary and independent workmen. See the Code de Commerce, Art. 258, 259, 261, with Rogron's Commentary.

Courts of Admiralty differed in the effect which they attributed to this rule. The Court of Admiralty upheld so strongly the right of the seamen to claim wages if freight was earned, that it held invalid all stipulations by which they consented to forego their claim to wages although freight might be earned on part of the voyage if the ship did not return to her port of discharge; whilst, on the other hand, the Courts of law gave effect to contracts of this description, acting upon the ordinary rule that the parties were bound by their express bargain without reference to its improvidence or hardship (*n*). This question is now, however, settled by the legislature, and, as we have seen, all contracts by which any seaman consents to forego any claim to wages in the case of the loss of the ship, are wholly void (*o*). It is not, however, to be supposed that all contracts under which it was stipulated that wages should not become payable until certain conditions precedent had been performed, were invalid. Where the payment of wages was made to depend upon the performance of the service until the completion of the voyage, or upon the arrival of the ship at the port of discharge, it was held that on the death of the seaman during the voyage in the one case, and on the loss of the ship before her arrival in the other, no wages accrued in respect of the service actually performed (*p*).

Right to
wages under
the Merchant
Shipping
Acts.

The ancient rule, that freight is the mother of wages, was modified by the 7 & 8 Vict. c. 112, and it has now been abrogated, for most purposes, by the Merchant Shipping Act, 1854. The former act (which was repealed by the 17 & 18 Vict. c. 120) enacted, that in cases of wreck or loss of the ship, the surviving seamen should be entitled to wages up to this period, whether the ship had earned freight or not, on producing a certificate that they had exerted themselves to the utmost to save the ship and stores (*q*). It is now provided

(*n*) *Appleby v. Dods*, 8 East, 300; *The Juliana*, 2 Dods. 510. A review of the cases in all the Courts is contained in Lord Stowell's judgment in this case. See also *Jesse v. Roy*, 1 C., M. & R. 316, and the American cases cited in the note to that case.

(*o*) The M. S. Act, 1854, s. 182.

(*p*) *Anon.*, 1 Sid. 179; *Cutler v. Powell*, 6 T. R. 320; see the note to this case, 2 Smith L. C. 11 (8th edit.); *Appleby v. Dods*, *ubi supra*. See as to where the

wages, or a portion of them, may be claimed on a *quantum meruit* although the terms of the original contract have not been performed, *Eaken v. Thom*, 5 Esp. 6; *Hillyard v. Mount*, 3 C. & P. 93; *White v. Mattison*, 2 Stark. 325; *Jesse v. Roy*, *ubi supra*.

(*q*) See the 7 & 8 Vict. c. 112, s. 17. Before this statute it had been held in the Court of Admiralty, in cases of shipwreck in which, although the cargo was lost, the fragments of the

by the Merchant Shipping Act, 1854, that no right to wages shall be dependent on the earning of freight, and that where freight has not been earned every seaman or apprentice may claim wages in the same way as if they had been earned, subject to his claim being barred by proof, in cases of wreck or loss of the ship, that he did not exert himself to the utmost to save the ship, cargo, and stores (r). If any seaman or apprentice who is entitled to wages under this provision dies before they are paid, they must be paid and applied as in cases of death during a voyage (s).

In a recent case where a seaman had signed an agreement under the Merchant Shipping Act, 1854, and had thereby agreed to serve on certain voyages to ports abroad and home to the final port of discharge in consideration that he should be paid as wages a certain sum per calendar month, it was held that his wages became due at the end of each month of service, and that though he was left behind at a port abroad by his own negligence he was entitled to recover his wages up to that time (t).

We have seen that in cases of sickness on board the ship the shipowner is not entitled to deduct anything from the wages of the seamen in respect of the expense of medicines, or surgical or

Effect of injuries and death on rights to wages.

ship were sold for a sum large enough to cover the seamen's wages, that the seamen were entitled to be paid (*The Sydney Cove*, 2 Dods. 13; *The Neptune*, 1 Hagg. 227; *The Lady Durham*, 3 ib. 196), and also that their title was not divested by the circumstance that the portions of the ship that had been preserved had been saved, not by themselves, but by third parties (*The Reliance*, 2 W. Rob. 119), the claim in these cases not being in the nature of a salvage claim. *Id.*; *The Neptune*, *ubi supra*. It may be useful to mention here, that before this act, it was also held that where a voyage was divided by various ports of delivery, so that the freight was earned in portions, a proportionate claim for wages attached at each of those ports (*The Juliana*, 2 Dods. 504; *Edwards v. Childs*, 2 Vern. 727; *Anon.*, 1 Ld. Raym. 639; *Hernaman v. Bawden*, 3 Burr. 1844); and that where advance money was paid before the voyage in part of the freight, and so named in the charter-party, the wages were payable according to the proportion of the freight thus paid, although the ship

was lost before she reached a port of delivery. *Anon.*, 2 Show. 283. In *Hollingworth v. Palmer*, 4 Ex. 267, the point was raised, but not decided, whether a seaman who did not leave the wreck, and was lost the next day, had acquired under the above section a title to his wages up to the time of the loss. This case is now provided for under the M. S. Act, 1854, s. 184.

(r) The M. S. Act, 1854, s. 183. It is probable that this section is intended to have a general application, and not to be limited (by the operation of sect. 109) to the case of seamen on registered ships. It will be observed that the statute now in force has adopted the more equitable rule of throwing upon the person who resists the payment of the wages the proof of the seaman not having performed his duty; instead of compelling the seaman to prove affirmatively that he has conducted himself properly.

(s) The M. S. Act, 1854, s. 184; and see *post*, p. 235.

(t) *Bulton v. Thompson*, L. R., 4 C. P. 330. See *ante*, p. 220, n. (p).

seaman's part he was not entitled to any wages after he left the ship (b).

In cases of impressment.

When a seaman was impressed he was usually entitled to his wages for the time during which he served (c). But while wages depended on the earning of freight, the right of the seaman to recover them depended upon the completion of the voyage by the ship, and if she was lost the wages could not be claimed (d).

Wages on volunteering into the navy.

The following regulations are also contained in the Merchant Shipping Act, 1854, with respect to the volunteering of seamen into the navy.

By sect. 215, whenever any seaman who has not previously committed any act amounting to and treated by the master as desertion leaves his ship to enter into the navy, and is received into the service, his clothes and effects must be delivered up to him, and a proportionate part of his wages down to the time of his entry must, subject to all just deductions, be paid to him. The mode of payment prescribed by the act, is as follows:—The master must pay the wages to the officer authorized to receive the seaman into the navy, either in money or by bill upon the owner payable at sight to the order of the Accountant-General of the Navy. If the wages are paid in money the amount is to be credited to the seaman in the ship's muster book; if the payment is by bill, it must be noted in the muster book and sent to the Accountant-General, who must present the same for payment and credit the seaman with the amount. The money or the produce of the bill is not to be paid to the seaman until the time when he would have been entitled to receive it if he had not quitted his ship; and if the bill is not duly paid on presentment, the amount due may be recovered, as wages, either by the Accountant-General or by the seaman (e).

(b) *Melville v. De Wolf*, 4 E. & B. 844.

(c) *Wiggins v. Ingleton*, 2 Ld. Raym. 1211. After this decision the case was expressly provided for by the 2 Geo. 2, c. 36, s. 13, but that statute was repealed by the 5 & 6 Will. 4, c. 19. It would seem, however, to come within the more general provision made by the M. S. Act, 1854, s. 215, as to the payment of wages when a seaman "leaves" his ship in order to enter the navy. If

the seaman can show that his impressment was the result of the malicious act of the master, it appears that he is entitled to his whole wages. See the judgments of Sir W. Scott in *The Jack Park*, 4 Rob. 311, and *The Malta*, 2 Hagg. 158.

(d) *Dunkley v. Bulwer*, 6 Esp. 86.

(e) The M. S. Act, 1854, s. 215. No officer who receives any such bill is subject to any liability in respect of it, except in respect of its safe custody,

In these cases, it is provided by sect. 216 of the statute, that if the owner or master shows, to the satisfaction of the Admiralty, that he has paid, or properly rendered himself liable to pay, any advance of wages to the seaman, and that, in cases of payment, such advance has not before the quitting of the ship been duly earned, or that, in cases of liability, the liability has been actually satisfied, the Admiralty may repay the amount to the owner or master, deducting it from the wages earned or to be earned by the seaman in the navy.

It is provided by sect. 217 of the act, that if, in consequence of seamen leaving the ship to enter the navy without the consent of the master or owner, it becomes necessary for the safety and proper navigation of the ship to engage substitutes, and the remuneration paid to them exceeds the amount which would have been payable to the seaman under his agreement for similar service, the excess may be repaid to the master or owner upon a certificate from the registrar of the Court of Admiralty (f).

The seamen are bound by their contract to devote the whole of their time to the service of their employers, and any contract for additional remuneration in respect of any services, however extraordinary, which fall within the duties of a seaman is void (g); for there is no consideration for such a promise. But where a vessel was left short of hands before the voyage was completed, and the remaining seamen were induced, by a promise from the master of additional remuneration, to continue the

Right to additional remuneration.

until transmitted to the Accountant-General. *Id.*

(f) The registrar is empowered to examine into and finally decide on claims of this description, subject to an appeal to the Judge of the Court, s. 218. And see Williams and Bruce, Admiralty Practice, p. 308. The M. S. Act, 1854, provides for the payment of the sums ascertained in this manner by the Accountant-General of the Navy, and declares, that any persons forging or fraudulently altering any document, or making use of any forged or altered document in support of such applications, or procuring or giving any false evidence or representation, knowing the same to be false, shall be guilty of a misdemeanor. See sects. 219, 220.

(g) *Thompson v. Havelock*, 1 Camp. 527; *Harris v. Watson*, 1 Peake, 102; *Stilk v. Myrick*, 2 Camp. 317; *The*

Araminta, 1 Spks. p. 224; see also *Elsworth v. Woolmore*, 5 Esp. 84; *Daf-ter v. Cresswell*, 7 D. & R. 650; *White v. Wilson*, 2 B. & P. 116. The same rule has been applied by the American Courts to a promise of remuneration by a passenger to one of the crew of a wrecked vessel. See 3 Kent Com. 186, note (a) (ed. 1873). A contract for remuneration exceeding the government allowance made with a person who is not then in the government service, is binding. *Clutterbuck v. Coffin*, 3 M. & G. 842; and *England v. Davidson*, 11 A. & E. 856, where the same principle was applied. Where a captain promised, on behalf of his owners, to pay monthly wages to one of the sailors in order to induce him to become an hostage, this was held to bind the owners, although they had abandoned the ship and cargo. *Yates v. Hall*, 1 T. R. 73.

voyage without any fresh hands being engaged, inasmuch as the seamen were not bound to incur the danger of navigating the ship with an insufficient complement, it was held that the new undertaking to proceed formed a sufficient consideration for the master's promise, and that the additional remuneration therefore was recoverable (*h*). If the seaman is called upon to perform services which are not within the terms of his engagement; for instance, if a common seaman is called upon to act as mate, he is entitled to extra pay (*i*). So, if a seaman is released from his original engagement, as by an entire change of the voyage, he may legally enter into a fresh agreement on different terms and for a higher remuneration (*j*).

**FORFEITURE
OF WAGES.
By refusing
to defend
ship.**

We proceed to consider the forfeiture of wages. By an early act, the 22 & 23 Car. 2, c. 11, s. 7, any seaman who refuses to assist in the defence of the ship against pirates, or who discourages the other mariners, is to forfeit his wages. And by the 8 Geo. 1, c. 24, s. 6, if this offence is committed on board a ship which carries guns, and the vessel falls into the hands of the pirate, the mariners are liable, in addition to the loss of wages, to six months' imprisonment. It is to the honour of our seamen that these enactments have given rise to no discussion in our Courts of law.

By desertion.

By the maritime law desertion causes an absolute forfeiture of wages (*k*). It is also provided by the Merchant Shipping Act, 1854, that any seaman who has been lawfully engaged to the sea service, and any apprentice, who is guilty of desertion, is liable, not only to the forfeiture of clothes and effects mentioned in the act, but also to forfeit all or any part of the wages or emoluments which he has then earned. This statute also enacts that, if the desertion takes place abroad, the seaman or apprentice is liable, at the discretion of the Court, to forfeit all or any part of the wages or emoluments which he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and also to satisfy any excess of wages paid by the master or owner of the ship from which he deserts to any substitute engaged in his place at a higher rate of wages (*l*).

(*h*) *Hartley v. Ponsonby*, 7 E. & B. 872. And see *Frazer v. Hatton*, 2 C. B., N. S. 512.

(*i*) *Hanson v. Royden*, L. R., 3 C. P. 47.

(*j*) See the judgment of Lord Campbell, C. J., in *Harris v. Carter*, 3 E. & B. 561. See also *The Warrior*, Lush.

476; and *The Le Jonet*, L. R., 3 A. & E. 556.

(*k*) *The Baltic Merchant*, Edw. 86; *The Pearl*, 5 Rob. 224. As to desertion see *ante*, p. 179.

(*l*) *Ante*, p. 181, and the M. S. Act, 1854, s. 243.

By the last-mentioned act, neglecting or refusing without cause to join the ship, or to proceed to sea, and absence without leave within twenty-four hours of the ship's sailing, or during the voyage, and absence without leave or cause not amounting to desertion, or not treated as such, leads to a forfeiture of a portion of the wages (*n*). And the same result follows from leaving the ship without leave after her arrival in the delivery port, and before she is placed in security (*o*). In these cases an entry of the offence must be made upon its commission in the official log, and a copy of it must be furnished to or read over to the offender, and an entry of his answer must also be made; and if this is not shown to have been done, by producing the entries where practicable, the Court hearing the case may decline to receive evidence of the offence (*p*).

The powers conferred by statute for the conveyance of deserters on board their ships have been already mentioned (*q*).

It is provided by sect. 250 of the Merchant Shipping Act, 1854, that whenever a question arises as to the forfeiture of wages by desertion, it is sufficient for the party insisting on the forfeiture to prove the due engagement of the seaman or apprentice, or that he belonged to the ship, and that he quitted her before the completion of the voyage or engagement; or if the voyage was to terminate in the United Kingdom and the ship has not returned, that he is absent and that an entry of the desertion has been duly made in the official log. This proof suffices, so far as relates to any question of forfeiture of wages or emoluments under the statute, unless the seaman or apprentice produces a proper certificate of discharge, or otherwise shows to the satisfaction of the Court that he had sufficient reason for leaving the ship.

Entering into the navy does not lead to a forfeiture of

(*n*) *Ante*, p. 182.

(*o*) *Ib.* Independently of any statutory provision, the voyage is not considered to be completed by the mere fact of arrival. The crew are bound to attend to the mooring of the ship and delivery of the cargo. See the judgment of Lord Stowell in *The Baltic Merchant*, Edw. 86. It was held, under a somewhat similar section in one of the earlier acts, (5 & 6 Will. 4, c. 19,) that leaving the ship before her arrival, without any intention of re-

turning, did not amount to an absolute desertion, and therefore only occasioned a forfeiture of a month's wages. *M'Donald v. Jopling*, 4 M. & W. 285; *The Two Sisters*, 2 W. Rob. 125.

(*p*) The M. S. Act, 1854, s. 243. See also sect. 256, as to the entry in the official log, and the payment to the mercantile marine office superintendents of the fines imposed on the seamen by the agreement.

(*q*) *Ante*, p. 184.

wages, since it is expressly provided by the Merchant Shipping Act, 1854, that any seaman may leave his ship for the purpose of forthwith entering into the Queen's naval service, and that such a leaving shall not amount to a desertion, or lead to any punishment or forfeiture whatever (*r*). All stipulations, moreover, in any agreement whereby any seaman is declared to incur any forfeiture or loss, in case he enters the navy, are void, and the insertion of any such stipulation by any master or owner renders him liable to a penalty not exceeding 20*l*. (*s*).

Where seaman convicted and punished.

Sect. 251 of the same act provides, that in all proceedings relating to wages, if it appear that during the course of the voyage the seaman or apprentice has been convicted by any competent tribunal of any offence, and rightfully punished, the Court hearing the case may direct that any part of the wages due, not exceeding 3*l*., be applied in reimbursing the costs incurred by the master in procuring the conviction and punishment.

Where false statements have been made by seaman on engagements.

The Merchant Shipping Act, 1854, also provides, that if any seaman on or before being engaged wilfully and fraudulently makes a false statement of the name of his last ship, or last alleged ship, or of his own name, he shall forfeit out of the wages which he may earn by the engagement a sum not exceeding 5*l*. (*t*).

Effect of other misconduct.

We have already mentioned the contingencies on which, under the forms of agreement now in use, wages are forfeited by misconduct (*u*), and the instances in which deductions are allowed from the wages of seamen, in respect of illness or the cost of their burial (*x*), and in cases of refusal to join the ship not amounting to desertion, and refusal to work, and imprisonment (*y*). The rules which are in force respecting the forfeiture of or a deduction from wages by reason of unfounded complaints

(*r*) The M. S. Act, 1854, s. 214, *ante*, p. 180, n. (*h*). This section is now extended (by sect. 13 of the M. S. Act, 1862) to the crews of sea-going yachts, fishing coasting vessels, and ships belonging to the General Lighthouse Boards.

(*s*) The M. S. Act, 1854, s. 214.

(*t*) The M. S. Act, 1854, s. 255. It is provided by sect. 223 of this act, that the additional wages which are to be paid to the seamen under that section when the allowance of provisions which has been agreed upon is reduced during the voyage, shall not be claimable in cases in which the reduction is

made by way of punishment in accordance with any regulation in the agreement, or during any time when the seamen wilfully and without sufficient cause refuse or neglect to perform their duty, or are lawfully under confinement for misconduct on board or on shore.

(*u*) *Ante*, p. 181, note (*v*). See also *ante*, p. 196.

(*x*) *Ante*, p. 209.

(*y*) *Ante*, pp. 182, 227, 228. See also the M. S. Act, 1854, s. 243, sub-s. 9.

to official persons in respect of unseaworthiness or the quality and quantity of the provisions on board (z), and with reference to the power of Naval Courts to discharge seamen on the high seas or abroad, and to order a forfeiture of wages, have also been already mentioned (a). The Merchant Shipping Act, 1854, also provides, that whenever any act of misconduct is committed, which by the agreement is punishable by a fine, the appropriate fine is to be deducted from the wages and paid over to a mercantile marine office superintendent (b).

It has been said that independently of any statute the wages of seamen are forfeited by habitual though not by occasional drunkenness, by insolent expressions, and acts of a mutinous character not apologised for, and by habitual disobedience, or by disobedience of a heinous and aggravated nature (c). But it is submitted that while acts of a less aggravated character than those mentioned may disentitle a seaman to recover wages which would otherwise have become due, it is open to considerable doubt whether at common law any acts can operate as a forfeiture of wages which have already accrued. It has been said by Molloy, that if the goods are embezzled or damaged by the mariners, the owners must deduct the same out of their freight to the merchants, and the master out of the wages of the mariners; and we have already seen that the form of agreement now in use expressly provides that this may be done (d).

(z) *Ante*, pp. 188, 204.

(a) *Ante*, p. 191.

(b) The M. S. Act, 1854, s. 256. This section contains full directions as to the mode of paying over these fines to the superintendents. Any master or owner who neglects to obey these regulations is liable, for each offence, to a penalty not exceeding six times the amount of the fine which is retained. See also the M. S. Act, 1862, s. 13.

(c) *The Macleod*, 5 P. D. 254; *The Exeter*, 2 Rob. 261; *The New Phoenix*, 1 Hagg. 198; *The Malta*, 2 ib. 158; *The Lady Campbell*, ib. 5; *The Ealing Grove*, ib. 15; *The Susan*, ib. 229, n.; *The Gondolier*, 3 Hagg. 190; *The Lima*, ib. 356; *The Duchess of Kent*, 1 W. Rob. 283; *Renno v. Bennett*, 3 Q. B. 768; *The Atlantic*, Lush. 566; see also the judgment of Mr. Justice Story, in the ship *Mentor*, 4 Mason (American) Rep. 90. The older decisions as to the effect of disobedience continue to be of some importance, for the rules of the ancient maritime law still regulate these questions, except

where the statute law has intervened. See the judgment of Dr. Lushington in *The Westmoreland*, 1 W. Rob. 221. It was said in one case by Lord Stowell, that any cause which would justify a master in discharging a seaman during the voyage, would also deprive him of his wages; but the rule now acted upon in Admiralty is, that the misconduct, to produce this result, must be such as to render the discharge imperatively necessary for the safety of the ship and the due preservation of discipline. See *The Blake*, 1 W. Rob. 73. By Art. 14 of the laws of Oleron, if a dispute arose between the master and a mariner, the master could not discharge him till he had thrice denied him his mess. See a note on this by Pardessus, *Lois Marit.* tom. 1, p. 334 (ed. 1828). A provision of the same kind occurs in the Consolato. See c. 267. This regulation was probably intended to allow time for reflection and repentance to both parties.

(d) Molloy, B. 2, c. 3, s. 9. Where damage to the cargo had arisen from

How the amount of forfeited wages is to be calculated.

By sect. 252, where the contract for wages is by the voyage or run, or by the share, the forfeiture of wages is to be calculated by ascertaining the proportion which the month or other period of time in respect of which it is incurred bears to the whole time spent in the voyage, and a sum bearing the same proportion to the whole wages or share is to be deducted.

Application of forfeited wages.

By sect. 253, all clothes, effects, wages and emoluments which are, under the provisions of the statute, forfeited for desertion, are applicable, in the first instance, towards the reimbursement of the expenses occasioned thereby to the master or owner. Wages and emoluments earned subsequently to the desertion may be recovered by the master, owner, or his agent, in the same way as the deserter might have recovered them, if not forfeited. Subject to this reimbursement, the wages and emoluments must be paid into the Consolidated Fund (e).

PAYMENT OF WAGES ON DISCHARGE.

The legislature has protected the seamen against any unnecessary delay in the payment of their wages. Thus, by sect. 187 of the Merchant Shipping Act, 1854, it is provided, that the master or owner of every home trade ship shall pay to every seaman his wages within two days after the termination of the agreement, or at the time when the seaman is discharged, whichever first happens. In the case of other ships (except those employed in the southern whale fishery, or other voyage for which the compensation consists wholly of a share in the profits), the wages must, under the same section, be paid within three days after the delivery of the cargo, or five days after the seaman's discharge, whichever first happens (f). In the case of foreign-going ships, it is moreover provided, by sect. 4 of the

the gross negligence of the second mate, and a deduction from the freight had been made in consequence, this was held to be pleadable as a set-off to the claim for wages. *The New Phoenix*, 2 Hagg. 420; and see the judgment of Sir W. Scott in *The Malta*, 2 *ib.* 172. See *ante*, p. 198, and the M. S. Act, 1854, s. 243, sub-s. 8.

(e) In all other cases of forfeiture of wages under this statute, the forfeiture (where it is not otherwise directed) is for the benefit of the master or owner by whom the wages are payable. The M. S. Act, 1854, s. 253. All questions relating to the forfeiture or deduction of wages may be determined in any proceeding for wages, even although

the offence in respect of which the question arises, has not been made the subject of a criminal proceeding. *Ib.* s. 254.

(f) Masters and owners, who neglect to observe these rules without sufficient cause, are liable to pay to the seamen, as wages, a sum not exceeding two days' pay for every day of delay not exceeding ten days. The M. S. Act, 1854, s. 187; the M. S. Act, 1862, s. 13; and in the case of a foreign-going ship, to be liable for after-accruing wages; the Merchant Seamen Act, 1880, s. 4. See, as to the provisions made by the American law for the speedy payment of wages, 3 Kent Com. 179.

Merchant Seamen Act, 1880, that the seaman at the time he leaves the ship at the end of his engagement shall be paid 2*l.*, or one-fourth of the balance due to him, whichever is least, and the remainder of his wages within two clear days (exclusive of any Sunday, fast day in Scotland, or bank holiday), after he so leaves the ship.

The Merchant Shipping Act, 1854, provides, by sect. 170, that in the case of all British foreign-going ships, wherever registered, all seamen discharged in the United Kingdom must be discharged and receive their wages before a superintendent of a mercantile marine office. In the case of home trade ships this may also be done, if the master or owner so desires (*g*).

By sect. 171, the master is, moreover, bound to deliver to every seaman (or in cases of discharge before a superintendent, to the latter), within twenty-four hours before the seaman is paid off, a full and true account of the wages, in a form sanctioned by the Board of Trade. This account must show all the deductions from the wages, and no deduction not mentioned in it is allowable, unless in respect of a matter happening subsequently to the delivery of the account (*h*).

Duty of master to deliver account of wages.

By sect. 173 of this statute, as amended by the Merchant Seamen Act, 1880, sect. 4, the superintendents have power to decide any question between the master or owner and any of the crew which both parties may agree in writing to submit to them. In such cases, and in all cases whether the parties consent or not, where the amount in dispute does not exceed 5*l.*, and the ship is a foreign-going ship, their award is conclusive, and need not be stamped.

Power of mercantile marine superintendents to decide disputes.

By sect. 174, in all proceedings relating to the wages or discharge of any seaman before a superintendent, the superintendent has power to call for all log-books or other documents as to the matter in question, and to examine the owner and his agent, and the master and any of the crew being then at or near the place of the inquiry.

(*g*) This section excepts cases in which directions to the contrary have been given by any competent Court. See *The Araminta*, Swa. 81.

(*h*) See Appendix, "Forms," No. 26*A*; and the M. S. Act, 1880, s. 4. The master is bound to enter, during the voyage, the deductions in a

book, and to produce this book, if required, at the time of the payment of the wages. *Ib.* Sects. 170 and 171 of the M. S. Act, 1854, are not applicable to yachts, coasting fishing vessels, or ships belonging to the three General Lighthouse Boards. See the M. S. Act, 1862, s. 13.

Settlement of wages.

The following are the rules laid down by the Merchant Shipping Act, 1854, with respect to the settlement of wages:—

On discharge before superintendent—mutual release of all claims to be signed.

It is enacted by sect. 175, that on the completion before a superintendent of a mercantile marine office of any discharge and settlement, a release of all claims in respect of the past voyage or engagement, in the form sanctioned by the Board of Trade, must be signed by the parties and attested by the superintendent. This release operates as a mutual discharge and settlement of all the demands in respect of which it is given (i). A copy of the release, certified under the hand of the superintendent, must be given to any party thereto requiring it. This copy is receivable in evidence as the original, in all future questions touching the claims. In all cases in which the statute requires that the discharge and settlement shall take place before a superintendent, no payment, receipt, settlement or discharge otherwise made can (except where the seaman of a foreign-going ship leaves the settlement of his wages to a superintendent under the 4th section of the Merchant Seamen Act, 1880) operate as a satisfaction or release. And whenever a master makes a payment before a superintendent, the latter is bound, if required, to give to the master a signed statement of the whole amount paid; and this statement is evidence as between the master and his employer that he has made the payments mentioned therein.

Voucher of payments made.

Certificates of discharge.

By sect. 172 of this statute, every seaman is entitled upon his discharge, or upon payment of his wages, to receive from the master a signed certificate, in a form sanctioned by the Board of Trade, specifying the period of his service, and the time and place of his discharge (k).

Report of character, &c.

By sect. 176, upon every discharge before a superintendent, the master must make and sign, in a form sanctioned by the Board of Trade, a report of the conduct, character and qualifications of the persons discharged, or he may state upon the form that he declines to give any opinion upon these particulars, or any of them. This report is transmitted, in order that it may be recorded, to the Registrar-General of Shipping and Seamen, or any other person appointed by the Board of Trade; and every seaman is entitled to have a copy of so much of the report as concerns himself given to him, or indorsed on his certificate

(i) In the case of foreign-going ships the seaman may consent to leave the settlement of his wages to the superintendent. The M. S. Act, 1880, s. 4. See Appendix, "Forms," No. 27, and the form of release incorporated with the

form of agreement sanctioned by the Board of Trade for foreign-going ships, Appendix, p. ccoxxv. See also *supra*, p. 211, and the M. S. Act, 1854, s. 205.

(k) See Appendix, "Forms," Nos. 28 and 28A.

of discharge. The statute makes it a misdemeanor knowingly to make or assist in making any false certificate or report, or to forge or fraudulently alter any report, or fraudulently to make use of any certificate or report or copy which is forged or altered, or does not belong to the seaman (*l*). Falseification of report of character a misdemeanor.

Under the Merchant Shipping Act, 1854, whenever British ships are transferred or disposed of abroad, the seamen are entitled to be discharged, and to receive the wages which they have earned, unless they consent to continue the voyage (*m*). This statute also provides, by sect. 209, that whenever any seaman or apprentice is left on shore abroad, in or out of the Queen's dominions, under a certificate of unfitness or inability to proceed on the voyage, the master must furnish a true account of the wages which are due, and must pay them either in money or by bill on his owner. And by sect. 210, the payment must be made to the seaman or apprentice himself, if it is made within the Queen's dominions; but, if not, it must be made to the consular officer, who is bound, if satisfied with the account of wages, to indorse on a duplicate a receipt for the money or the bill. If the seaman subsequently obtains employment, or otherwise quits the port, the consular officer is entitled to deduct out of the sum received by him any expenses which have been incurred by him in respect of the subsistence of the seaman or apprentice under the provisions of the act (except those expenses which are to be borne by the master or owner), paying over the balance to the seaman or apprentice. How accounts are to be rendered and wages paid when ship is sold, or seamen left abroad.

The Merchant Shipping Act, 1854, also enacts, by sect. 177, that, if the Board of Trade so directs, facilities may be given for remitting the wages and other moneys of seamen and apprentices to their relatives or others, by means of money orders issued by the superintendents of mercantile marine offices (*n*). Seamen's money orders.

(*l*) See Appendix, "Forms," No. 28; the M. S. Act, 1854, s. 176. As to what amounts to an alteration see *Reg. v. Wilson*, 27 L. J., M. C. 230. It is not necessary that the crew of yachts should be discharged before a superintendent of a mercantile marine office, nor need their wages be paid in the presence of this officer. Sections 172 and 176 of the M. S. Act, 1854, are extended by s. 13 of the M. S. Act, 1862, to sea going

yachts and other vessels there mentioned.

(*m*) *Ante*, p. 211. The M. S. Act, 1854, s. 205. If the seaman or apprentice dies before his ship leaves the port, or is sent home at the public expense, the amount received by the consular officer must be dealt with under the provisions of the act, or accounted for to the Board of Trade. *Id.*

(*n*) Seamen's money orders are now issued at any mercantile marine office

And by sect. 178, the Board may cause the amount of a money order to be paid to the person in whose favour it was made, or to his personal representatives, legatees or next of kin, notwithstanding that the order may not be in his or their possession (*p*).

Seamen's
savings
banks.

By sect. 180, the National Debt Commissioners were also empowered to establish savings banks for the receipt of deposits, not exceeding 150*l*. in the whole in respect of any one account, from or on account of seamen or their wives and families. This enactment was extended by a later act to all seamen and their wives and families, whether the seamen belong to the navy or to the merchant or any other service (*q*).

By the 19 & 20 Vict. c. 41, the immediate management and control of savings banks for seamen was placed in the hands of the Board of Trade, which is empowered to establish a central savings bank for seamen in London and branch savings banks at such ports and places as should be thought expedient, and to constitute any shipping office a branch savings bank, and require any mercantile marine superintendent belonging to such office to act as agent in carrying out the act (*r*).

The following are the provisions of the Merchant Shipping Act, 1854, with reference to the relief of seamen's families out of the poor rates:—

Statutory
provisions
for repay-
ment of
parochial
relief to
family out
of wages.

By sect. 192, whenever, during the absence of any seaman on a voyage, his wife, children or step-children become chargeable to any union or parish in the United Kingdom, the union or parish is entitled to be reimbursed any sums properly expended in their maintenance out of the wages of the seaman earned during the voyage. If only one of such relations is chargeable, the sum to be deducted is not to exceed one-half, or two-thirds in case two or more relations are charge-

in the United Kingdom, payable at any other mercantile marine office in the United Kingdom free of expense. Money orders payable at any mercantile marine office in the United Kingdom are also issued at the ports or places abroad, a list of which is set out in an official notice printed at the beginning of the form of Official Log issued by the Board of Trade.

(*p*) Any mercantile marine superintendent, or other public officer, who grants or issues a money order with a

fraudulent intent is guilty of felony. The M. S. Act, 1854, s. 179.

(*q*) See sect. 17 of the M. S. Act, 1855.

(*r*) See Appendix, p. cxxi. Savings banks under the provisions of the act have been established at the mercantile marine offices in all the principal ports in the United Kingdom. Interest at the rate of 3*l*. per cent. per annum is allowed on every pound deposited up to 200*l*.

able. And if, during the seaman's absence, any sums have been paid by the owner, under an allotment note, to or on behalf of these relations, the reimbursement is to be limited to the excess, if any, of the above-mentioned proportions of wages over the sums so paid (s).

By sect. 194, whenever any seaman or apprentice belonging to or sent home in any British ship employed on a voyage which is to terminate in the United Kingdom dies on the voyage, the master is bound, under heavy penalties, to take charge of all the money, clothes and effects which the seaman may leave on board. He may, if he thinks fit, cause any of the clothes and effects to be sold by auction at the mast, or other public auction, and he is bound to sign an entry in the official log, containing full particulars of the property and of the results of the sale, and of the amount of wages due (t).

Disposal of wages and effects of seamen dying on voyage.

By sect. 195, the master is bound in these cases to hand over the money and wages and any effects not sold, to the superintendent of the mercantile marine office at the port of destination. If, however, the ship touches and remains for forty-eight hours at any foreign port, or port in the Queen's dominions abroad, before it reaches a port in the United Kingdom, the master must report the case to the British consul or officer of customs, and, if required, must deliver the money, wages and effects to him; and in all cases in which any seaman or apprentice dies during a voyage or engagement, the master is bound to give to the Board of Trade, or the officers mentioned above, an account of the effects, money and wages. On compliance with these regulations of the act, the master is, at the port of destination,

(s) The mode of obtaining this reimbursement is pointed out by the act. The parish officers may give a notice to the shipowner stating the proportion of wages which it is intended to claim, and requiring the owner to retain the same for a period not exceeding twenty-one days from the seaman's return, and also requiring that notice of his return shall be given to the parish officers. The owner is bound to act upon this notice, and, on the seaman's return, the parish officers may claim the amount summarily before two justices, who may order it to be paid. If no such order is obtained within the period mentioned in the notice from the parish officers, the owner is bound to pay

over the wages to the seaman without deduction. The M. S. Act, 1854, s. 193.

(t) It is declared by the M. S. Act, 1854, s. 109, that the provisions of the act as to the wages and effects of deceased seamen and apprentices shall apply, unless the context requires a different application, to all sea-going British ships wherever registered, of which the crews are discharged or whose final port of destination is in the United Kingdom, and to the owners, masters and crews of these ships. These sections are now extended (by sect. 13 of the M. S. Act, 1862), to sea going yachts, fishing coasting vessels, and ships of the General Lighthouse Boards.

entitled to receive a certificate from the superintendent, without which no foreign going ship can clear inwards (u).

Sect. 197 provides that, in these cases, if the seaman or apprentice dies abroad leaving any money or effects, not on board his ship, the chief officer of Customs, or British consular officer at or nearest to the place, is to take charge of them. This officer may sell any of these effects, or any effects delivered to him under the provisions mentioned above, and must account for the proceeds, and any wages paid to him, to the Paymaster-General. This section is extended by sect. 20 of the Merchant Shipping Act, 1862, to seamen or apprentices who have belonged, within the six months immediately preceding their death, to a British ship (x).

Recovery
and payment
of wages of
seamen lost
with their
ship.

The Merchant Shipping Act, 1862, also contains provisions with reference to the recovery and payment of wages of seamen and apprentices who are lost with their ship.

The following are the provisions of sect. 21 of this act on this subject :—

- (1.) The Board of Trade may recover these wages from the owner of the ship in the same manner in which seamen's wages are recoverable :
- (2.) In proceedings for the recovery of such wages, if it is shown by an official return produced out of the custody of the Registrar-General of Shipping and Seamen or by other evidence that the ship has, twelve months or upwards before the institution of the proceeding, left a port of departure, and if it is not shown that she has been heard of within twelve months after such departure, she is to be deemed to have been lost with all hands on board, either immediately after the time she was last heard of, or at such later time as the Court hearing the case may think probable :
- (3.) The production out of the custody of the Registrar-General of Shipping and Seamen or of the Board of Trade

(u) See Appendix, "Forms," No. 27A. If these provisions are disregarded, the master is liable to heavy penalties. The owner is liable to account if the master does not, and the money, wages and effects are recoverable as wages. The M. S. Act, 1854, s. 196.

(x) Declarations have been made between the British government and the

governments of Denmark (11th April, 1877,) and Italy (17th April, 1877,) as to the disposal of the estates of British seamen who have died on board of ships belonging to the subjects to those states. Arrangements for a similar purpose are in existence with the governments of France, Germany, and Sweden and Norway.

of any duplicate agreement or list of the crew made out at the time of the last departure of the ship from the United Kingdom, or of a certificate purporting to be a certificate from a consular or other public officer at any port abroad, stating that certain seamen or apprentices were shipped in the ship from the said port, is, in the absence of proof to the contrary, to be sufficient proof that the seamen or apprentices therein named were on board at the time of the loss :

- (4.) The Board of Trade is bound to deal with these wages in the manner in which they deal with the wages of other deceased seamen and apprentices under the Merchant Shipping Act, 1854.

By sect. 198 of the Merchant Shipping Act, 1854, whenever any seaman or apprentice dies in the United Kingdom, and is entitled to claim from the master or owner any effects or unpaid wages, they must be duly accounted for to the superintendent of the mercantile marine office at the port where the seaman or apprentice was discharged or was to have been discharged, or to the Board of Trade.

Of wages
and effects
of seamen
dying at
home.

By sect. 199, whenever the money and effects of deceased seamen or apprentices received by the Board of Trade, or its agents, under the provisions mentioned above, do not exceed in value 50%, the Board may, after deducting the expenses, pay and deliver over the same to any claimants who can prove themselves, to the satisfaction of the Board, to be either the widows or children, or to be entitled to the effects of the deceased seamen under a will, or under the statutes of distribution, or under any other statute, or at common law, or to be entitled to take out probate or letters of administration or confirmation, though they may not have been actually taken out. The Board is discharged from all further liability if it acts under these provisions; it may, however, require probate or letters of administration or confirmation to be taken out. When the money and effects exceed 50% in value, the Board must, after deducting the expenses, pay over the same to the personal representatives.

These rules are, however, subject to the following provisions :—

By sect. 200, if the deceased has left a will, the Board may

refuse to pay or deliver the wages or effects to any one claiming under a will made on board ship, unless it is in writing, and signed or acknowledged in the presence of and attested by the master or first or only mate. And if the claim is put forward under a will made elsewhere than on board ship, and by a person not related to the deceased by blood or marriage, the Board may refuse to deliver up the wages or effects, unless the will is in writing, and signed or acknowledged in the presence of and attested by two witnesses, one of whom must be a mercantile marine office superintendent, or a minister, or officiating minister, or curate of the place where it was made. If the will was made at a place where there are no such persons, one of the witnesses must be a justice of the peace, or consular officer, or officer of Customs (y).

Rights of
creditors to
payment
of their
claims out of
the wages
and effects
of deceased
seamen.

The following are the rules laid down by the Merchant Shipping Act, 1854, for the purpose of preventing fraud with reference to the claims of creditors of deceased seamen and apprentices:—

By sect. 201, no creditor is entitled to claim from the Board of Trade the wages and effects by virtue of letters of administration taken out by him, or confirmation in Scotland as executor creditor; nor is any such creditor entitled, by any means whatever, to payment of his debt out of the wages or effects, if the debt accrued more than three years before the death, or the demand is not made within two years after the death. The steps to be taken for procuring the payment of debts, subject to these provisions, are as follows:—the creditor must deliver to the Board of Trade an account, in writing, stating the particulars of his claim; this account must mention the place of abode of the creditor, and must be verified by a declaration before a magistrate. If, before this demand is made, the claim of the widow, or any child, or that of any person claiming under a will, or any statute, or at common law, has been allowed by the Board, notice of this is to be given, and the creditor thereupon acquires the same rights and remedies against the person whose claim has been allowed as if he or she had received the wages and effects as the legal personal representative of the deceased.

(y) When the claim under a will is rejected under these provisions, the wages and effects must be dealt with as if no will had been made. The M. S. Act, 1854, s. 200. As to the wills of seamen under the 29 Car. 2, c. 3,

s. 23, and the 1 Vict. c. 26, s. 11, exempting mariners and seamen "*being at sea*" from making formal wills, see *In the goods of Saunders*, L. R., 1 P. & D. 16; *In the goods of M'Murdo*, *ib.* 640.

By the same section it is provided that, where, before the creditor's demand, no such claim has been allowed, the Board must investigate the creditor's account, and may call upon him to prove the same and to produce all the vouchers relating to it; and if the Board is satisfied of the justice of the demand, or any part of it, it must order it to be paid, so far as the assets in its hands may extend. If the Board is not satisfied, or the proper proof is not produced, and no sufficient reason is given for not producing it, the demand must be disallowed. And in all cases the Board may delay the investigation of any demand by a creditor for a year; and if during that time a claim is substantiated by the widow, or any child, or any one claiming under a will, or statute, or at common law, the Board may allow such claim; in which case the creditor is entitled, as against the other claimant, to the remedies mentioned above.

By sect. 202, whenever no claim is made to wages and effects in the hands of the Board within six years after their receipt, the Board has an absolute discretion either to allow or refuse any later claim (s).

By sect. 203, the statute subjects all persons who commit forgery, or fraudulently alter any documents, or give or procure any false evidence for the purpose of obtaining any money or effects of deceased seamen or apprentices, to severe punishment.

By sect. 204, whenever seamen are invalided or discharged from any of the Queen's ships, and are sent home in merchant ships, the moneys and effects belonging to them, which are paid over, under the provisions of the act, to the Board of Trade or its agents, must be paid over and disposed of as the Accountant-General of the Navy may direct.

It is not necessary to enter here at any length into the history of the early remedies for wages. Seamen always had a remedy by action in the common law Courts where the persons liable to pay them their wages were within the jurisdiction of those Courts. But the right of the seamen to sue in the Courts of Admiralty was a source of frequent contention between those Courts and the Courts of common law.

REMEDIES
FOR THE
RECOVERY OF
WAGES.

(s) The money arising from unclaimed wages and effects must be paid over by the Board (subject to the claims of the Accountant-General of

the Navy, under sect. 204), into the Consolidated Fund. The M. S. Act, 1854, s. 202.

The latter denied the existence of this right, and, at last, acknowledged it with reluctance and jealousy, holding that it was a mere indulgence to the seamen expressly against the statute (15 Rich. 2, c. 3), which ordained that the Court of Admiralty should have no jurisdiction over contracts arising within the body of a county. This indulgence, it was said, had been granted because the remedy in the Admiralty was easier, and better; easier,—since the seamen could in that Court sue jointly, instead of being obliged to sever as in the Courts of common law (*a*); and better,—since the ship herself was in the Admiralty Court answerable for their claim. The right to sue, moreover, when once conceded, was narrowed by the Courts of law as much as possible, for although it was held to include the mate, it was not extended to the master, who was considered to contract on the credit of the owners, and not, like the seamen, on that of the ship (*b*). Distinctions were also made as to suits for wages earned on board ship, and for carpenter's work done on shore (*c*), and the right of the Admiralty Courts to proceed on contracts under seal was denied (*d*). These questions are not, however, now of any practical interest, for not only has the jurisdiction of the Court of Admiralty over ordinary (*e*) contracts for wages long been exercised without dispute, but its jurisdiction has recently been confirmed and extended by the Legislature.

Jurisdiction
of Admiralty
Division
under the Ad-
miralty Court
Act, 1861.

By the Admiralty Court Act, 1861, it was provided that the Admiralty Court should have jurisdiction over all the claims by seamen of any ship (*f*), for wages earned by them on board the ship, whether the same were due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned on board the ship, and disbursements made by him on account of her (*g*).

(*a*) See Molloy, B. 2, c. 3, s. 8.

(*b*) Molloy, *ubi sup.*; *Clay v. Snelgrove*, 1 Lord Raym. 576; *S. C.* 1 Salk. 33; *Comb.* 74; *Carth.* 518.

(*c*) Molloy, B. 2, c. 3, s. 8.

(*d*) *Bens v. Parre*, 2 Lord Raym. 1206. The earlier cases will be found collected and commented on in Molloy, *ubi sup.*, and in Abbot on Shipping. See also *The Harriet*, Lush. 285; *The Victoria*, 37 L. J., P. & M. 12.

(*e*) Where the contract was for a specific sum for the voyage, and in other respects special, the Court of Admiralty held that it had no jurisdic-

tion. *The Debreccia*, 3 W. Rob. 33. See also *The Sydney Cove*, 2 Dods. 11; *The Mona*, 1 W. Rob. 137; *The Riby Grove*, 2 *ib.* 52; *The Harriet*, Lush. 285.

(*f*) 24 Vict. c. 10, s. 10, App. p. cxxiii. The word "ship" according to the interpretation clause of the act (s. 2) includes "any description of vessel used in navigation, not propelled by oars."

(*g*) It was provided by the same section, that if the plaintiff did not recover 50*l.*, he was not entitled to any costs, unless the judge certified that the cause was a fit one to be tried in the Admiralty Court. This proviso,

It has been decided that under this provision the Admiralty has jurisdiction to entertain a claim for damages for the wrongful discharge of a seaman during the term of his engagement (h).

In causes of wages the Admiralty Division has jurisdiction by statute to decide all questions of title to ships (i).

In the Admiralty Division the claimant for wages may proceed either against the ship and freight or against the owners(k), and the seamen, in all cases where the master has not contracted so as to incur no personal liability, may proceed either in the Admiralty or at Common Law against the master (l).

The right of proceeding against the ship and freight is founded upon a maritime lien which the mariners have upon the ship and freight for their wages. This lien (m) extends

Maritime
lien for
wages.

however, would seem now to be repealed by the Judicature Acts. See *Garnett v. Bradley*, 3 App. Cas. 944, and Order LV. of the Rules of the Supreme Court. By sect. 189 of the M. S. Act, 1854, it was provided that wages under the sum of 50*l.* should not be recovered in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any Superior Court of Record in the Queen's dominions unless the owner was adjudged bankrupt or declared insolvent, or the ship was under arrest, or was sold by the authority of any of these Courts, or unless any justices acting under the M. S. Act, 1854, should have referred the case to be adjudged by these Courts, or unless it happened that neither the owner nor the master was or resided within twenty miles of the place where the seaman or apprentice was discharged or put on shore. As to the meaning of "resided" see *The Blakeney*, Swab. 428. The restrictions imposed by this section were held to apply to the case of a master suing for his wages. *Id.* In *Burns v. Chapman*, 5 C. B., N. S. 481, it was doubted whether sect. 189 of the M. S. Act, 1854, applied to a claim for wages earned on board an American ship. Somewhat similar provisions as to the recovery of wages were contained in the 7 & 8 Vict. c. 112, although the limit placed by that act on the right of suing for wages in the Admiralty Courts, &c. was 20*l.* It was considered under the last-mentioned statute that where the claim for wages was under this sum, the Admiralty

Court could not entertain it unless it was apparent that justice could not be fully and efficiently administered by a magistrate. See the judgment of Dr. Lushington in *The King William*, 2 W. Rob. 231.

(h) *The Great Eastern*, L. R., 1 A. & E. 384; *The Blessing*, 3 P. D. 35.

(i) The 3 & 4 Vict. c. 65, s. 4, App. p. ccxiii., note (f).

(k) The Admiralty Court Act, 1861, c. 10, s. 35. The surgeon may sue, *Mills v. Long*, 1 Sayer, 136; *The Wharton*, 3 Hagg. 148, note (n); the carpenter, *The Lord Hobart*, 2 Dods. 104; the boatswain, *Ragg v. King*, 2 Str. 858. So, a woman, who has acted as cook and steward and keeper of the ship and stores in harbour and as a mariner may recover her wages in this Court. *The Jane and Matilda*, 1 Hagg. 187. Where a mate became master during the voyage, by the removal of the master, it was held, before the extension by statute of the master's remedies, that he might sue in the Admiralty for his wages as mate during the whole of the voyage, but not for the additional wages due to him as master. *The Favourite*, 2 Rob. 232; see also *Hanson v. Royden*, L. R., 3 C. P. 47. An apprentice can sue in the Admiralty for wages. *The Albert Crosby*, Lush. 44.

(l) *Buck v. Raulinson*, 1 Bro. P. C. 137; *Bayly v. Grant*, 1 Salk. 33; *The Stephen Wright*, 12 Jurist, 732; *The Salacia*, Lush. 548; *The Jack Park*, 4 Rob. 308.

(m) The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up, is by a proceeding in the

not only over the whole ship, but also over those parts of her which are separated by a storm (*n*); and it is not destroyed by the hypothecation of the ship, or even by her sale to a bona fide purchaser without notice (*o*). It ranks below liens for damage done by collision (*p*) and for subsequent salvage (*q*), but takes precedence of the lien of a bottomry bond holder whether the loan was effected on the same or on a previous voyage to that in respect of which the wages were earned (*r*).

The seaman's lien for wages has priority over the master's lien for wages or for disbursements (*s*). A shipwright who has repaired a ship cannot, by virtue of his possessory lien, obtain payment of his claim for repairs in priority to wages earned before the date when the repairs were done (*t*).

Within what
time actions
for wages
must be
brought.

Actions for wages must be brought within six years (*u*). There formerly was an exception in favour of persons under disability or absent beyond the seas, but this is no longer the case (*x*).

Right of the
seamen to re-

The rights of action which belong to the ordinary contract of

winding-up, and not by a proceeding in rem in the Admiralty Court. *In re the Australian Direct Steam Navigation Company*, L. R., 20 Eq. 325. The arrest of a vessel by the Admiralty Court is a sequestration within the meaning of the Companies Act, 1862, s. 163. *In re Rio Grande do Sul Steamship Company*, 5 Ch. Div. 282. As to bankruptcy of the owner see *Halliday v. Harris*, L. R., 9 C. P. 668; and *In re T. C.*, L. R., Irish, 11 Eq. 151.

(*n*) See the Consolato, c. 193, and per Lord Stowell, in *The Neptune*, 1 Hagg. 238; *The Golubechick*, 1 W. Rob. 143; *The Julia*, 2 Dods. 504. As against the cargo, *quid cargo*, there is no lien. See the judgments in *The Lady Durham*, 3 Hagg. 200, and *The Riby Grove*, 2 W. Rob. 59. In America the seamen have a lien upon the ship for their wages. *Sheppard v. Taylor*, 5 Peters (American) Rep. 676. Where a subject of the United States was mate on board a vessel of that country, during a voyage from California to Great Britain, and by the death of the master during the voyage he became in possession of the ship as master, and afterwards proceeded in the British Court of Admiralty against the freight for wages due to him, it was held that the *lex fori* must govern the case, and that he had a lien on the freight. *The Milford*, Swa. 362. The master has, however, now a lien for his wages and

disbursements; see *ante*, p. 124; and *The Feronia*, L. R., 2 A. & E. 65.

(*o*) *The Sydney Cove*, 2 Dods. 13; *The Batavia*, *ib.* 500; *The Margaret*, 3 Hagg. 238; *The Druid*, 1 W. Rob. 398; *The Nymph*, Swa. 86. See also the judgment in *Brown v. Lull*, 2 Sumner (American) Rep. 443.

(*p*) *The Benares*, 7 No. Ca. Supp. lii.; *The Linda Flor*, Swa. 309.

(*q*) *The Gustaf*, Lush. 506.

(*r*) *The Madonna d'Idra*, 1 Dods. 37; *The Sydney Cove*, 2 *ib.* 11; *The Hersey*, 3 Hagg. 407; *The Janet Wilson*, Swa. 261; *The William F. Safford*, Lush. 69; *The Union*, *ib.* 128; *The Gustaf*, Lush. 506.

(*s*) *The Salacia*, Lush. 545; 32 L. J., P. M. & A. 41.

(*t*) *The Gustaf*, Lush. 506. The claim of a person who has paid seamen's wages at the request of the master on account of the ship is entitled to the same priority as a wages claim. *The W. F. Safford*, Lush. 69.

(*u*) 21 Jac. 1, c. 16, s. 3; 3 & 4 Will. 4, c. 42, s. 3. Suits for wages in the Admiralty Court must also have been brought within six years. 4 Anne, c. 16, s. 17.

(*x*) See the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10. As to the construction of this section, see *Cornill v. Hudson*, 8 E. & B. 429.

hire may be narrowed by the express agreement between the parties. Thus, it was held that no action could be brought in the Courts of this country for wages by foreign seamen who had entered into an agreement not to sue for wages in a foreign country, even although the ship and cargo were confiscated in an English port, and the voyage was thereby ended (*y*). And where a seaman entered into articles by which he agreed not to sue any of the owners for wages except one of them, who was the captain, it was held, that he could not sue the others, although they had received the proceeds of the cargo, and one of them was the managing owner, who adjusted the wages and settled with the seamen (*z*).

cover wages may be affected by the express terms of their agreement.

Where the voyage is illegal, that is, is contrary to our municipal law, as, for instance, where it is in violation of the Slave Trade Acts, or of the Foreign Enlistment Act, the seamen, unless they are ignorant of the real object of the voyage, cannot recover their wages (*a*). But inasmuch as it is no offence against municipal law for a neutral to trade with a blockaded port, an owner cannot set up as an answer to a suit for wages that the agreed voyage was for the purpose of running a blockade (*b*).

Effect of illegality of the voyage.

By sect. 190 of the Merchant Shipping Act, 1854, no seaman whose voyage or engagement is to terminate in the United Kingdom is entitled to sue abroad for his wages, unless he is discharged with the sanctions required by the act (*c*), and with the written consent of the master, or unless he proves such ill-usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to his life, if he had remained on board; but if any seaman on his return proves that the master or owner has been guilty of any conduct or default which, but for the statute, would have entitled him to sue for wages before the termination of the voyage or engagement, he is entitled to recover, in addition to his wages, such

Restrictions on suits for wages being brought abroad.

(*y*) *Gienar v. Meyer*, 2 H. Bl. 603; *Johnson v. Machielsens*, 3 Camp. 44.

(*z*) *M'Auliffe v. Bicknell*, 2 C., M. & R. 263. And see *The Nina*, L. R., 2 P. C. 49.

(*a*) See the judgment of Sir C. Robinson, in *The Vanguard*, 6 Rob. 207; *The Malta*, 2 Hagg. 163; *Burton v. Pinkerton*, L. R., 2 Ex. 340. Where the prosecution of the voyage becomes

illegal by reason of war, it has been held in America that no wages are due. *The Saratoga*, 2 Gallison (American) Rep. 164.

(*b*) *The Helen*, L. R., 1 A. & E. 1. See also *Ex parte Chavasse, Re Grazbrook*, 34 L. J., Bank. 17, and the authorities cited in *The Helen*.

(*c*) See, as to this, the M. S. Act, 1854, ss. 205, 207, 209.

compensation not exceeding 20% as the Court hearing the case may think reasonable.

Summary jurisdiction of magistrates where wages do not exceed 50%.

By sect. 188 of the Merchant Shipping Act, 1854, any seaman or apprentice, or any person duly authorized on his behalf, may sue summarily for any wages not exceeding 50% over and above the costs of the proceedings, as soon as the wages become payable. This proceeding must be before any two justices (*d*) acting in or near the place at which the service terminated, or the seaman or apprentice was discharged, or at which the person on whom the claim is made resides; and the order of the justices in the matter is final (*e*).

Jurisdiction of county courts.

County courts having Admiralty jurisdiction (*f*) now possess jurisdiction as to any claim for wages (*g*) in any cause in which the amount claimed does not exceed 150%, and in any such cause where the amount claimed exceeds 150% but the parties have agreed in writing that any specified county court having Admiralty jurisdiction shall have jurisdiction (*h*).

Where any Court or magistrate has power to direct the payment of any seaman's wages, penalties or other sums of money, if the person ordered to pay them is the master or owner, and the same are not paid as directed, the Court may direct the amount to be levied by distress and sale of the ship, and of her tackle, furniture, and apparel (*i*).

Jurisdiction over claims for seamen's wages is conferred on the Vice-Admiralty Courts (*j*) by the Vice-Admiralty Court Act, 1863 (*k*).

(*d*) Or before a stipendiary magistrate. The M. S. Act, 1854, s. 519.

(*e*) But see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 33). In Scotland, the proceedings must be either before such justices as are above mentioned, or before the sheriff of the county within which the place is situated. The M. S. Act, 1854, s. 188.

(*f*) For a list of these Courts see Appendix, "Orders in Council," pp. 20-25.

(*g*) As to these words see *The Blessing*, 3 P. D. 35.

(*h*) 31 & 32 Vict. c. 71, s. 3, Appendix, p. cccvii; see also the County Courts Act, 1875 (38 & 39 Vict. c. 50), Appendix, p. cccxxxiv. The 9th section of the 31 & 32 Vict. c. 70, provided that if any person should take in a su-

perior Court without the leave of such Court proceedings which he might without agreement have taken in a County Court, and did not recover a sum exceeding 300% (in a cause of wages), he should be liable to be condemned in costs, unless he obtained a certificate for costs. These provisions seem, however, to have been rendered inoperative by the provisions of the Judicature Act. See *Garnett v. Bradley*, 3 App. Cas. 944, and Rules of the Supreme Court, Order LV.

(*i*) *Ib.* s. 523.

(*j*) See *supra*, p. 123, note (*y*).

(*k*) 26 Vict. c. 24, s. 10. See App. ccxlii. See *The City of Petersburg*, 1 Stuart's Vice-Adm. R., N. S. 343. As to the jurisdiction of the Vice-Admiralty Courts in causes of wages previously to the passing of that sta-

Foreign seamen may proceed in Admiralty against foreign ships coming to this country; but the Court is unwilling to interfere in these cases without the consent of the representative of the nation to which the parties belong; and, although his consent is not necessary, the rule acted upon is, that notice of the proceedings must be given to him (*l*). Where an owner had employed American seamen (at a period when they were alien enemies) in order to make his vessel pass for an American ship, he was not allowed to set up that fact in answer to a claim in the Admiralty Court for wages (*m*). The right to sue for wages was also recognized in a case where the seamen, who were alien enemies, had earned their wages in a foreign ship on a voyage under the protection of a British licence (*n*). Foreign seamen improperly discharged in this country, have been held, in the Court of Admiralty, entitled in addition to their wages to a sufficient sum to cover the expenses of their return home (*o*).

The 230th sect. of the Merchant Shipping Act, 1854, enacts that where, in any matter relating to a ship or the persons belonging thereto, there is a conflict of laws, and no provision in the third part of the act is expressly applicable, the case shall be governed by the law of the flag (*p*).

By the 20 Geo. 2, c. 38, a corporation was created for relieving and supporting maimed and disabled seamen, and the widows and children of those killed in the merchant service (*q*). The 37 Geo. 3, c. 73, the 4 & 5 Will. 4, c. 52, the 6 & 7 Will. 4, c. 15, and the 7 & 8 Vict. c. 112, also contained provisions for the support and regulation of this institution.

Under these acts masters and owners in the merchant service navigating their own ships, and seamen employed in it, were

tute, see *The Rajah of Cochin*, Swa. 473; *The Australia*, Swa. 480.

(*l*) *The Vrow Mina*, 1 Dods. 234; *The Golubchick*, 1 W. Rob. 143. See also as to the interference of our Courts for the protection of foreign mariners, *The Madonna d'Idra*, 1 Dods. 37; *The Wilhelm Frederick*, 1 Hag. 138; *The Octavie*, Br. & L. 215; 33 L. J., P. M. & A. 115. See also as to the practice of the Court of Admiralty in these cases, *The Nina*, L. R., 2 A. & E. 44, and L. R., 2 P. C.

38. The practice is now regulated by Rules of the Supreme Court, Order V., rule 11a, subs. b.

(*m*) *The Frederick*, 1 Dods. 266.

(*n*) *The Maria Theresa*, 1 Dods. 303.

(*o*) *The Madonna d'Idra*, 1 Dods. 37; *The Gustaf*, Lush. 506; *The Union*, Lush. 128.

(*p*) See *Lloyd v. Guibert*, L. R., 1 Q. B. 115.

(*q*) A somewhat similar system is established in America. See 3 Kent, Com. pp. 179, 181.

Suits by foreign seamen.

Conflict of laws.

CHARITABLE CORPORATIONS FOR RELIEF OF SEAMEN, &c.

compelled to contribute towards a fund called the Merchant Seamen's Fund, out of which the corporation was empowered to relieve disabled or decrepit seamen, and those who had been shipwrecked or taken by the enemy, and also the widows and children of seamen who had been killed or drowned.

In consequence, however, of this fund having been, to some extent, diverted from its original purpose, the Seamen's Fund Winding-up Act, 1851 (14 & 15 Vict. c. 102), provided that contributions to the fund should cease to be compulsory, and that no one should be allowed to contribute to it who was not a contributor at the time of the passing of the act.

And, finally, the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), repealed all the statutes relating to the subject except certain portions of the 14 & 15 Vict. c. 102 (*r*), and put an end to the system established by the earlier acts, except so far as it was preserved for the purpose of winding up the fund (*s*).

Another institution for the benefit of merchant seamen, namely, "*The Seamen's Hospital Society*," was established in 1821, and afterwards incorporated by the 3 & 4 Will. 4, c. 9. This society is now supported by voluntary contributions. For some years it was also entitled, under the 14 & 15 Vict. c. 102, to receive the proceeds of the unclaimed effects and wages of deceased seamen, and to certain annual contributions for a limited period by the Board of Trade out of the Merchant Seamen's Fund (*t*). These provisions have now either expired or have been repealed by the Merchant Shipping Repeal Act, 1854 (*u*).

The Greenwich Hospital Act, 1869 (32 & 33 Vict. c. 44), enabled the Admiralty and the Board of Trade to pay a limited sum in pensions to merchant seamen who before 1835 contributed to Greenwich Hospital. By a subsequent Act of 1872 (35 & 36 Vict. c. 67) this limit was removed, and annuities of 3*l.* 8*s.* a year are now granted to all seamen who can show to

(*r*) The following sections remain unrepealed, sects. 4—26, 39, 50, 52—61. See also the Shipping Law Amendment Act, 1853 (16 & 17 Vict. c. 131), ss. 28, 29.

(*s*) It is provided by the 22nd section of the act, that all masters and seamen who, before the passing of the act, had contributed to the fund, should be allowed to continue to contribute

in the manner provided for by the act, and should, in respect of their contributions, be entitled to relief in the manner and subject to the conditions therein mentioned.

(*t*) See the 14 & 15 Vict. c. 102, ss. 29—38, 51, 61.

(*u*) See the Schedule to the 17 & 18 Vict. c. 120.

the satisfaction of the Board of Trade at least five years' service previous to January, 1835, and who during that period contributed sixpence a month to the funds of Greenwich Hospital (*x*).

The 546th sect. of the Merchant Shipping Act, 1854, enables the corporation of any borough being a seaport, and any association constituted for any public purpose connected with shipping, with the consent of the Home Secretary, to appropriate lands vested in them as sites for sailors' homes.

(*x*) See Order in Council of the 7th October, 1869, and Report on Merchant Shipping Legislation, Parl. Papers (C.—1398), Sess. 1876.

anchor (*l*), the regulation of her speed (*m*), the manœuvres to avoid collision or other danger (*n*), and in cases where the ship is being towed, the direction of the navigation of the tug (*o*), are matters within the province of the pilot.

Signals to be used by vessels requiring the services of a pilot are specified in Sched. 2 of the Merchant Shipping Act, 1873 (*p*).

**PILOTAGE
AUTHORITIES.**

In most of the ports of England, societies or corporations have long been established, either under charters from the Crown, or under local acts of Parliament, for the appointment and control of pilots in particular localities (*q*).

It is unnecessary to mention here all the provisions by which these various societies are governed, or the limits of their authority; there is, however, one body which is regulated by charters and public statutes, and which requires a special notice, owing to the number of the pilots under its control, and the large extent of its jurisdiction. This is the corporation of Trinity House of Deptford Strond (*r*). The Cinque Port Pilots were formerly under the control of the Society or Fellowship of the Cinque Port Pilots; but these pilots are now under the jurisdiction of the Trinity House (*s*).

6 P. C. 451; *The Lotus*, Stuarls, Vice-Adm. R., N. S. 58; *The Anglo-Saxon*, *ib.* 117.

(*l*) *The Princeton*, 3 P. D. 90; *The Northampton*, 1 Spinks, 152; *The Peerless*, Lush. 30; *The Woburn Abbey*, 38 L. J., Ad. 28.

(*m*) *The Calabar*, L. R., 2 P. C. 238.

(*n*) *The Ocean Wave*, L. R., 3 P. C. 209; *The Iona*, L. R., 1 P. C. 426.

(*o*) *The Julia*, Lush. 232; *The Energy*, L. R., 3 A. & E. 48; *The Ocean Wave*, L. R., 3 P. C. 205.

(*p*) See Appendix, p. cccxxvi, and as to the improper use of them, or failure to use them, *ante*, p. 144.

(*q*) See Appendix, p. 110, where an attempt has been made to arrange in tabular form the names or titles of the several pilotage authorities in England and Wales, the limits of their jurisdiction, the Statutes and Orders in Council by which the pilotage in each case is regulated, and whether or not the pilotage is compulsory, except for exempted ships. The table in question will also be found to contain references to all the decided cases which appear to be material. See also the Reports of the Select Committee on the Pilotage Bill (1870),

343, sess. 1870. For a list of pilotage authorities in Scotland and Ireland, see Appendix, p. 125. In the undermentioned cases, the nature of the pilotage in the following rivers or places abroad has been discussed:—*The River Hoogley*—*The Peerless*, Lush. 30; *The St. Lawrence*—*The Hibernian*, L. R., 4 P. C. 511; *Flushing Roads*—*The Halley*, L. R., 2 P. C. 193; *Bombay*—*Muhammad Yunus v. The Peninsular and Oriental Steam Navigation Company*, 6 Bombay L. R. 98.

(*r*) *Post*, pp. 271—280. As to the appointment of Sub-Commissioners of Pilotage by the Trinity Houses of Hull and Newcastle, see the M. S. Act, 1854, s. 387. As to the ancient constitution and establishment of the Trinity House of Deptford Strond, see "The Royal Charter of Confirmation granted by . . . King James II. to the Trinity House of Deptford Strond . . . London, printed in the year 1763." A supplementary charter was granted in November, 1870. See also Appendix, p. 111, note (*a*).

(*s*) See the 16 & 17 Vict. c. 129, s. 4, App. xx.; the M. S. Act Repeal Act, 1854, s. 6, App. clxvi; The M. S. Act, 1854, s. 331.

Independently of such provisions as are contained in local statutes, the jurisdiction of pilotage authorities (*t*) within the United Kingdom now depends, for most purposes, upon the Merchant Shipping Act, 1854. The provisions relating to this subject are contained in the Vth Part of the act, sections 330 to 388. These sections regulate the powers of pilotage authorities in general; the returns to be made by them to the Board of Trade; the licensing of pilots, masters and mates; and the rights, privileges, liabilities and remuneration of pilots. They also define the powers of the Trinity House of Deptford Strond, and contain the regulations now in force with reference to compulsory pilotage, pilot boats, rates of pilotage, and the Trinity House Pilot Fund. These provisions are extended by sections 39 and 42 of the Merchant Shipping Act, 1862, and the Merchant Shipping Act, 1872, sections 9, 10 and 11. All the powers and jurisdiction possessed by pilotage authorities before the Merchant Shipping Act, 1854 (*u*), are retained, so far as they are consistent with that act (*v*).

Pilotage authorities may, under this statute, by bye-laws made with the consent of the Queen in Council, exempt the masters of any ships or classes of ships from being compelled to employ qualified pilots. They may annex terms or conditions to such exemptions, and revise or extend existing exemptions as may seem desirable (*x*), but not so as to take away any existing statutory exemptions (*y*). They may also, subject to the provisions of the Merchant Shipping Act, 1854, by bye-law, made with the consent of the Queen in Council, do all or any of the following things *within their districts* (*z*):—

Power to
make bye-
laws.

(1.) Determine the qualifications to be required from persons

(*t*) By the M. S. Act, 1854, s. 2, the words "pilotage authority" include all bodies and persons authorized to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage.

(*u*) It is provided by sect. 3 that the act should come into operation on the 1st May, 1855.

(*v*) The M. S. Act, 1854, s. 331. This provision, which appears to amount to a substantial incorporation in the M. S. Act, 1854, of so much of the earlier acts conferring pilotage jurisdiction as is not inconsistent with that statute, renders it frequently necessary to refer to the earlier, and now repealed, statutes on this subject. The most material provisions of these acts will be

found in the Appendix, pp. i—xvii, xix—xxiii.

(*x*) The M. S. Act, 1854, s. 332. See the M. S. Act, 1862, s. 39.

(*y*) *The Earl of Auckland*, Lush. 164, 387.

(*z*) The M. S. Act, 1854, s. 333. As to licences beyond the district, see *post*, p. 253. These bye-laws must, before they are submitted to the Queen in Council, be published in the manner prescribed by the Board, and the Orders in Council must be laid before Parliament as soon as possible after they are made. See ss. 334, 335. By s. 336, a power is given to qualified pilots, local marine boards, and, where there is no such boards, to masters, owners, and insurers, not less than six in number, to

applying to be licensed as pilots, whether in respect of their age, skill, time of service, character or otherwise :

- (2.) Make regulations as to the approval and licensing of pilot boats and ships, with power to establish and regulate companies for the support of these boats and ships ; and for a participation of the profits made by them (z) :
- (3.) Make regulations for the government of the pilots licensed by them, and for insuring their good conduct, and their constant attendance to and effectual performance of their duty, either at sea or on shore :
- (4.) Fix the terms and conditions of granting licences to pilots and apprentices, and of granting pilotage certificates to masters and mates (a), and make regulations for punishing any breach of the regulations mentioned in the act committed by pilots or apprentices, or by masters and mates, by the withdrawal or suspension of their licences or certificates, or by the infliction of penalties, recoverable summarily before two justices (b) ; so that no penalty be made to exceed the sum of 20*l.*, and that every penalty be capable of reduction at the discretion of the justices by whom it is inflicted :
- (5.) Fix the rates and prices or other remuneration to be demanded and received for the time being by pilots licensed by the pilotage authority, or alter the mode of remunerating them, in such manner as it may, with the consent already mentioned, think fit, so that no higher rates or prices be demanded or received from the masters or owners of ships in the case of the Trinity House than the rates and prices specified in the table marked (U.) in the schedule to the act, and in the case of all other pilotage authorities, than the rates and prices which

appeal to the Board of Trade against any bye-law, and thereupon the Board may revoke or alter it. For references to the Orders in Council approving such bye-laws, see Appendix, "General Table of Pilotage Authorities," p. 110, and "List of Pilotage Authorities in Scotland and Ireland," p. 125. The principal bye-laws of the Trinity House of London will be found in the Appendix, "Orders in Council," pp. 68—82.

(z) This provision, so far as it relates to companies, is now repealed by the Companies Act, 1862 (25 & 26

Vict. c. 89). The companies established under the section were, by its terms (see App. p. cix.) exempted from the provisions of the 7 & 8 Vict. c. 110, An Act for the Registration, Incorporation and Regulation of Joint Stock Companies, which was, however, repealed by The Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47, s. 107).

(a) See the M. S. Act, 1854, s. 340, and *infra*, p. 265.

(b) Or a stipendiary magistrate. The M. S. Act, 1854, s. 519, and see *ante*, pp. 188—190.

might have been lawfully fixed or demanded by them under any act of parliament, charter, or custom in force immediately before the commencement of the act :

- (6.) Make such arrangements with any other pilotage authority for altering the limits of their respective districts, and for extending the powers of the other authority, or the privileges of the pilots licensed by it, to all or any part of its own district, or for limiting its own powers or the privileges of its own pilots, or for sharing them with the other authority and the pilots licensed by it, or for delegating or surrendering them to any pilotage authority already constituted or to be constituted, and to the pilots licensed by it, as may appear desirable for the purpose of facilitating navigation or of reducing charges on shipping :
- (7.) Establish, either alone or in conjunction with any other pilotage authority, funds for the relief of superannuated or infirm qualified pilots, or of their wives, widows or children, or make any new regulations with respect to any funds already applicable to these purposes, with power to determine the amount, manner, time and persons (such persons to be in the service of such pilotage authority) to and in which and by and upon whom the contributions in support of such existing or future funds are to be made or levied ; and to declare the persons (such persons being confined to men in the service of the pilotage authority, their wives, widows or children) entitled to participate in the benefits of the existing or future funds, and the terms and conditions upon which they are to be so entitled :
- (8.) Repeal or alter any bye-law made in exercise of these powers, and make new bye-laws in lieu thereof :

And every bye-law duly made by any pilotage authority in exercise of the powers so given to it is to be valid and effectual, notwithstanding any act of parliament, rule, law, or custom to the contrary.

By the Merchant Shipping Act, 1872, s. 11, any pilotage authority may, if authorized in that behalf by Order in Council, grant special licences qualifying the persons to whom they are granted to act as pilots for any part of the sea or channels

Power
to grant
special li-
cences beyond
pilotage
limits.

beyond the limits of any pilotage authority, so, however, that no pilot so licensed be entitled to supersede an unlicensed pilot outside the limits of the authority by which he is licensed (b).

Board of
Trade may
transfer
jurisdiction of
pilotage au-
thority and
constitute
pilotage
authority.

By the Merchant Shipping Act, 1862, sect. 39, power is given to the Board of Trade, by provisional order, to do the following things:—

- (1.) Whenever any pilotage authority residing or having its place of business at one port has or exercises jurisdiction in matters of pilotage in any other port, to transfer so much of this jurisdiction as concerns such last-mentioned port to any harbour trust or other body exercising any local jurisdiction in maritime matters at the last-mentioned port or to any body to be constituted for the purpose by the provisional order, or, in cases where the pilotage authority is not the Trinity House of Deptford Strond, to that body; or to transfer the whole or any part of the jurisdiction of the pilotage authority to a new body corporate or body of persons to be constituted for the purpose by the provisional order, so as to represent the interests of the several ports concerned:
- (2.) To make the body corporate or persons to whom the transfer is made a pilotage authority within the meaning of the principal act, with such powers for the purpose as may be in the provisional order in that behalf mentioned:

To determine the limits of the district of the pilotage authority to which the transfer of jurisdiction is made;

To sanction a scale of pilotage rates to be taken by the pilots to be licensed by the last-mentioned pilotage authority;

To determine to what extent and under what conditions any pilots already licensed by the former pilotage authority shall continue to act under the new pilotage authority;

(b) Orders in Council have been made authorizing the Trinity House of London and the Tyne Pilotage Commissioners to grant special pilotage licences under this provision. The Order in Council relating to the special pilotage licences to be granted by the London Trinity House is set out in the Appendix, "Orders in Council," p. 81; whilst the Order in Council

obtained by the Tyne Pilotage Commissioners with respect to special licences is dated November 20, 1873. Pilotage licences for the North Sea, &c., are granted by the Trinity House of Hull under their charters and local act. See Appendix, "General Table of Pilotage Authorities in England and Wales," p. 118.

To sanction arrangements for the apportionment of any pilotage funds belonging to the pilots licensed by the former pilotage authority between the pilots remaining under the jurisdiction of that authority and the pilots who are transferred to the jurisdiction of the new authority ;

To provide for such compensation or superannuation as may be just to officers employed by the former pilotage authority and not continued by the new authority :

- (3.) To constitute a pilotage authority and to fix the limits of its district in any place in the United Kingdom where there is no such authority ; so, however, that in the new pilotage districts so constituted there shall be no compulsory pilotage, and no restriction on the power of duly qualified persons to obtain licences as pilots :
- (4.) To exempt the masters and owners of all ships, or of any classes of ships, from being obliged to employ pilots in any pilotage district or in any part of any pilotage district, or from being obliged to pay for pilots when not employing them in any district or in any part of any pilotage district, and to annex any terms and conditions to such exemptions :
- (5.) In cases where the pilotage is not compulsory, and where there is no restriction on the power of duly qualified persons to obtain licences as pilots, to enable any pilotage authority to license pilots and fix pilotage rates for any part of the district within the jurisdiction of such authority for which no such licences or rates now exist :
- (6.) In cases where the pilotage is not compulsory, and where there is no restriction on the power of duly qualified persons to obtain licences as pilots, to enable any pilotage authority to raise all or any of the pilotage rates now in force in the district or any part of the district within the jurisdiction of such authority :
- (7.) In cases where the pilotage is not compulsory, and where there is no restriction on the number of pilots, or on the power of duly qualified persons to obtain licences as pilots, to give additional facilities for the recovery of pilotage rates and for the prevention of the employment of unqualified pilots :
- (8.) To give facilities for enabling duly qualified persons,

after proper examination as to their qualifications, to obtain licences as pilots (a).

Duty of pilotage authorities to make returns to Board of Trade.

By the Merchant Shipping Act, 1854, sect. 337, every pilotage authority must deliver periodically to the Board of Trade, in the form and at the times required by the Board, returns of the following particulars with regard to pilotage within the port or district under their jurisdiction (b):—

- (1.) All bye-laws, regulations, orders, or ordinances relating to pilots or pilotage for the time being in force:
- (2.) The names and ages of all pilots or apprentices licensed or authorized to act by the pilotage authority, and of all pilots or apprentices acting either mediately or immediately under it, whether licensed or authorized, or not:
- (3.) The service for which each pilot or apprentice is licensed:
- (4.) The rates of pilotage for the time being in force, including the rates and descriptions of all charges upon shipping made for or in respect of pilots or pilotage:
- (5.) The total amount received for pilotage, distinguishing the amounts received from British ships and from foreign ships, and the amounts received in respect of classes of ships paying different rates of pilotage, according to the

(a) By s. 40 of the M. S. Act, 1862, the rules are given, which are to be observed with respect to provisional orders made in pursuance of the act. These are in substance as follows:—

1. Application in writing for the order must be made to the Board of Trade by some persons interested in the pilotage of the district.

2 & 3. Notice of the application must be published, once in each of two successive weeks in the month immediately succeeding the time of the application, in the *Shipping Gazette* and in one of the county newspapers, stating the objects it is proposed to effect by the order.

4. The Board, before making an order, has six weeks in which to refer the application to the district pilotage authorities, and to consider any objections which may be made.

5. The Board may settle the order in such manner and with such terms and conditions as they may think fit, consistently with the provisions of the act.

6. No order is to take effect until confirmed by Parliament, for which purpose the Board is to introduce a public general bill, setting out the pro-

visional order.

7. Any portion of the order which may be petitioned against in its passage through Parliament, may be referred to a select committee, and the petitioner may appear and oppose.

(b) These returns must be laid before Parliament by the Board of Trade. If pilotage authorities (other than the Trinity House of Deptford Strond and its sub-commissioners) fail to make these returns as required within a year from the time fixed by the Board of Trade, or if they do not allow the Board, or those appointed by it, to inspect their books and documents, the Queen may, by order in Council, suspend their powers for so long as she thinks fit, and during their suspension their powers and rights are to be exercised by the Trinity House. See ss. 338, 339.

Provisional orders under this act have been made in several instances, and confirmed by Act of Parliament. For the more important of these acts see Appendix, "General Table of Pilotage Authorities in England and Wales," p. 110.

scale for the time being in force, and the amounts received for the several classes of service rendered by pilots; and also the amount paid by such ships as have, before reaching the outer limits of pilotage water if outward bound, or their port of destination if inward bound, to take or pay for two or more pilots, whether licensed by the same or by different pilotage authorities; together with the numbers of the ships of each of these classes:

- (6.) The receipt and expenditure of all moneys received by or on behalf of the pilotage authority, or any sub-commissioners appointed by them, in respect of pilots or pilotage:

The pilotage authorities must also allow the Board of Trade, or any persons appointed by it, to inspect all books or documents in their possession relating to the matters which are required to be returned to the Board.

Under the Merchant Shipping Act, 1854, sect. 349, every qualified pilot on his appointment receives a licence (c), mentioning his name and usual place of abode, together with a description of his person, and a specification of the limits within which he is qualified to act. The principal officer of customs at the place at or nearest to which the pilot resides must, upon his request, register the licence; and no qualified pilot can act as such until his licence is registered. Any qualified pilot acting beyond the limits for which he is qualified, is considered as an unqualified pilot. PILOT
LICENCES.

Under sect. 350, every qualified pilot is, upon receiving his licence, to be furnished with a copy of that part of the Merchant Shipping Act, 1854, which relates to pilotage, and of the rates, bye-laws and regulations established within the district for which he is licensed; and he must produce these copies to the master of any ship, or other person employing him, when required to do so, under a penalty not exceeding 5*l*.

By sect. 351, every qualified pilot, while acting in that capacity, must be provided with his licence, and produce it to every person by whom he is employed, or to whom he tenders his services as pilot. If he refuses to do so he incurs for each

(c) See the M. S. Act, 1854, s. 333. As to the licences of the pilots licensed by the Trinity House of Deptford

Strond, see the M. S. Act, 1854, s. 370, and *The Beta*, Br. & L. 331.

offence a penalty not exceeding 10*l.*, and is subject to suspension or dismissal by the pilotage authority by whom he is licensed.

By sect. 352, every qualified pilot, when required by the pilotage authority who appointed him, must produce or deliver up his licence; and on the death of any qualified pilot the person into whose hands his licence happens to fall must, without delay, transmit the same to the pilotage authority which appointed the deceased pilot. Non-compliance with these provisions subjects the offender to a penalty not exceeding 10*l.* (*d*).

PILOT BOATS. The Merchant Shipping Act, 1854, provides also for the approval and licensing of pilot boats by the pilotage authorities, and for the mode by which they are to be distinguished.

By sect. 345, all boats and ships regularly employed in the pilotage service of any district are to be approved and licensed by the pilotage authority of the district, who may, at its discretion, appoint and remove the masters.

Sect. 346 contains regulations with reference to the painting of the pilot boats black, with the name of the port and owner on the stern in white. The number of the licence must also be painted on the bows (*e*). This section also regulates the flags which these boats must carry. The master is liable for a breach of these regulations to a penalty not exceeding 20*l.*

By sect. 347, when any qualified pilot is carried off in a boat or ship not in the pilotage service, he must, subject to a penalty not exceeding 50*l.*, exhibit the prescribed flag, in order to show that the boat or ship has a qualified pilot on board.

By sect. 348, if any boat or ship, not having a licensed pilot on board, displays a flag such as a pilot boat is required to carry, a penalty not exceeding 50*l.* is incurred, to be recovered from the owner or master of the boat.

**COMPULSORY
PILOTAGE
(GENERAL).**

With respect to the compulsory employment of pilots (*f*), the

(*d*) A pilot who has been called upon under this section to deliver up his licence cannot set up as an excuse that the pilotage authority has acted in an arbitrary or capricious way. *Henry v. Newcastle Trinity House Board*, 8 E. & B. 723.

(*e*) The regulations of the Trinity House of Deptford Strond require in addition that the number of each pilot boat licensed by it should be marked on the mainsail or trysail.

The Board of Trade have, under the powers given them by the 3rd section of the M. S. Act, 1873, exempted pilot boats from such of the provisions of that section as require the name to be marked on the bows, and the name of the port of registry to be marked on the stern, and a scale of feet to be marked on the stem and stern.

(*f*) As to the liability of the owners in cases where the pilot is employed by compulsion of law, see *infra*, p. 281.

Merchant Shipping Act, 1854, provides, by sect. 353, that subject to any alteration to be made by any pilotage authority in pursuance of the powers already noticed (*g*), the employment of pilots is to continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when that act came into operation (*h*), and all exemptions from compulsory pilotage then existing within these districts are also to continue in force. The master of any unexempted ship navigating within these districts who, after a qualified pilot has offered to take charge of the ship or has made a signal for that purpose, either himself pilots the ship without possessing a pilotage certificate (*i*) enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within these districts who, after a qualified pilot has offered to take charge of the ship, or has made a signal for that purpose, employs or continues to employ an unqualified pilot to pilot her, incurs for every offence a penalty of double the amount of pilotage demandable for the conduct of the ship (*j*).

General provision as to districts where pilotage compulsory before the Merchant Shipping Act, 1854.

(*g*) See *supra*, p. 251.

(*h*) The act came into operation on the 1st of May, 1855. See the M. S. Act, 1854, s. 3.

(*i*) See the M. S. Act, 1854, ss. 340, 342, 355, and *post*, pp. 265, 266.

(*j*) The M. S. Act, 1854, s. 353. See also ss. 58 and 59 of the 6 Geo. 4, c. 125 (Appendix, p. xii), the provisions of which have been held, in the Court of Admiralty, to be still in force; *The Killarney*, Lush. 427; *The Earl of Auckland*, Lush. 387; *The Hanna*, L. R., 1 A. & E. 283; *The Hankow*, 4 P. D. 197. A similar provision to that mentioned in the text is contained in s. 70 of the last-mentioned statute, and under that section it was held that the prohibition did not preclude the master from applying to his vessel any moving power which he might select. Thus, he was entitled to use another vessel, or boats, or a steam tug for this purpose; and if this could not be done without necessarily devolving upon those who applied the power the selection of the course, and a certain portion, or indeed all the charge and conduct of the vessel in that course, still, if the *bond fide* object of the employment was the motive power, the person so employed was not a pilot, and was not within the meaning of the

act. *Beilby v. Scott*, 7 M. & W. 93. It was held, also, under s. 58 of that act, that a master was not liable for refusing to employ a pilot unless he produced his licence, although it was not demanded. *Hammond v. Blake*, 10 B. & C. 424; see also *Usher v. Lyon*, 2 Price, 118, decided upon the 52 Geo. 3, c. 39, s. 34. In an action for a breach of a similar provision in the 52 Geo. 3, c. 39, s. 58, it was held that it was not sufficient to follow the words of the act in the declaration, but that it was necessary to aver that the offer was made to the master, or in his presence. *Peake v. Carrington*, 2 B. & B. 399; *S. C.* 5 B. Moore, 176; see also *Reg. v. Chaney*, 6 Dowl. 281, and *Chaney v. Payne*, 1 Q. B. 712. The amount of the pilotage upon which the penalty is to be paid is that which would accrue on all the remaining voyage during which the master was bound to have a pilot on board. *Mackie v. Landon*, 6 Taunt. 256, decided on a similar provision in the 52 Geo. 3, c. 39, s. 11. It was also held, that the master of a vessel who navigated her himself, though liable to double the amount of pilotage under s. 58 of the 6 Geo. 4, c. 125, was not liable to the penalty imposed by s. 70 of that act. *Beilby v. Shepherd*, 3 Exch. 40.

Passenger
steamers ply-
ing on the
coasts of the
United King-
dom and the
Channel
Islands.

By sect. 354, the master of every ship carrying passengers between any place situate in the United Kingdom, or the islands of Guernsey, Jersey, Sark, Alderney and Man, and any other place so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority, must (unless he or his mate have a pilotage certificate granted either by a pilotage authority under the 340th section of the Merchant Shipping Act, 1854, or by the Board of Trade under the 342nd section or the 355th section of the same act) employ a qualified pilot to pilot the ship; and if he fails to do so he is liable to a penalty not exceeding 100*l.* (*i*).

In addition to these general enactments special provisions are contained in the Merchant Shipping Act, 1854, with respect to compulsory pilotage within the pilotage districts of the Trinity House of Deptford Strond. These will be noticed in a later part of the Chapter.

Foreign
vessels.

Foreign ships are within these enactments of the Merchant Shipping Act, 1854, relating to compulsory pilotage (*k*). A statute imposing upon all inward-bound vessels, in general terms, an obligation to take a pilot at a station beyond three miles from the British shore, is binding upon foreign ships (*l*).

EXEMPTIONS
FROM COMPUL-
SORY PILOTAGE
(GENERAL).

We have seen that sect. 353 of the Merchant Shipping Act, 1854, preserves, subject to any alterations to be made by pilotage authorities under the provisions of that act, the exemptions from compulsory pilotage which existed when it was passed. According to the construction which has been put upon this provision by the decided cases, not only are the numerous local exemptions which were at the coming into operation of the Merchant Shipping Act, 1854, in existence within the several pilotage districts within the United Kingdom, either under charters, local statutes, or orders in council, still in force (*m*), but so are also the

(i) See *The Temora*, Lush. 17; *The Beta*, Br. & L. 328. In Ireland this section has been held to apply to a steamer carrying passengers between two places within the limits of the port of Dublin. *The Dublin Port and Harbour Board v. Shannon*, L.R., Irish, 7 C.P. 116. The words "Home trade passenger ships" in the marginal note to the section are misleading. (See the M. S. Act, 1854, s. 21.)

(k) See *post*, p. 286, and the M. S. Act, 1854, ss. 376—384. Foreign ships, within British jurisdiction, are

now subject to the statutory regulations in force for preventing collisions. The M. S. Act, 1862, s. 57. Before the passing of that act it was held, in the Privy Council, that the provisions of ss. 296—298 of the M. S. Act, 1854, as to navigation and lights, did not apply to a foreign ship navigating the Solent within three miles of the British coast. See *The Saxon*, Lush. 410, and *post*, Chap. COLLISION.

(l) *The Annapolis*, Lush. 295.

(m) See Appendix, pp. 110—125.

general exemptions contained in the repealed act of the 6 Geo. 4, c. 125, except where they are interfered with by new provisions contained in the Merchant Shipping Act, 1854 (*n*), and colliers, ships trading to Norway, the Cattegat, or Baltic, or round the North Cape, or into the White Sea, or constant traders inwards from the ports between Boulogne and the Baltic, having British registers, and coming by the North Channel (*o*), are not (unless they are being navigated under circumstances which bring them within the operation of some provision of the Merchant Shipping Act, 1854, which makes pilotage compulsory) bound to carry pilots so long as they are navigated by their masters without other assistance than the ordinary crew. So, Irish traders using the navigation of the Thames or Medway (*p*), vessels employed in the regular coasting trade (*q*), or being wholly laden with stone, the produce of, and exported from the Channel Islands or the Isle of Man, and all vessels of British register not exceeding sixty tons burthen, must, according to the principles of the decisions, be considered as entitled to a similar exemption; and upon the same grounds it has been decided that vessels are not bound, under ordinary circumstances, to take a pilot on board if they are within their own port, and that is not a port as to which particular provision (*r*) had been made by any act of parliament or charter for the appointment of pilots, before the passing of the 6 Geo. 4, c. 125 (*s*).

Exemptions
under the
6 Geo. 4,
c. 125.

(*n*) *Reg. v. Stanton*, 8 E. & B. 445, the first case in which it was held that one of the exemptions in s. 59 of 6 Geo. 4, c. 125, was still in force. This decision was followed in *The Earl of Auckland*, Lush. 164; *S. C.* in the Privy Council, *ib.* 387. See also *The Killarney*, *ib.* 427.

(*o*) See *The Earl of Auckland*, *ubi sup.*, and *post*, p. 262.

(*p*) It has been decided that this exemption does not apply to an Irish trader carrying passengers. See *The Temora*, Lush. 17; and *post*, p. 262.

(*q*) See the M. S. Act, 1854, s. 379, and the cases there cited.

(*r*) As to what amounts to a "particular provision," see *Hadgraft v. Hewith*, L. R., 10 Q. B. 350; and *The Hankow*, 4 P. D. 197.

(*s*) See *The Killarney*, Lush. 427. In this case a point was decided which is of very general importance, and deserves examination. It was a case in which a ship had been piloted into the port of Goole by a licensed pilot. The ship was a Goole ship, and it was

necessary to determine, on a question of collision, whether the employment of the pilot was compulsory; or whether, the ship being at the time of the collision within the limits of the port to which she belonged, the master was entitled to pilot her himself by reason of the exemption in this respect contained in s. 59 of the 6 Geo. 4, c. 125. The material provisions of that act which bear upon the question are as follows:—By s. 58, every master who acts himself as a pilot after "any party licensed and qualified to act as such within the limits in which the ship then actually" is, has offered to take charge of the ship is liable to a penalty; provided, however (by s. 59), that the master of "any ship whatever, whilst the same is within the limits of the port or place to which she belongs (the same not being a port or place in relation to which particular provision hath heretofore been made by any act or acts of parliament, or by any charter or charters for the appointment of pilots) may lawfully" conduct or pilot his own ship, so long

The above-mentioned exemptions do not, however, qualify the express provisions in the 354th sect. of the Merchant Shipping Act, 1854, making it compulsory for ships carrying

as he does so without the assistance of any unlicensed pilot. [See these sects. *post*, Appendix, p. xii.] It appeared that by the 52 Geo. 3, c. 39, s. 21, an act earlier than the statute in question, the Trinity House of Hull had been enabled to appoint sub-commissioners of pilotage to examine pilots and give licences for pilots piloting ships within the limits of its jurisdiction, that these powers had been acted upon, and that Goole was within those limits. Upon these facts and statutory provisions, the Court of Admiralty was of opinion that the employment of the pilot was compulsory, since the power given to the master, by s. 59 of the 6 Geo. 4, c. 125, of piloting his own ship, when within her own port, was limited to cases in which no particular provision had been previously made by any statute or charter for the appointment of pilots for that port, and that it appeared, in the case in question, that provision had been made in this respect by the earlier act for the port of Goole. There is much difficulty in construing the provisions of these earlier acts, and in ascertaining to what extent and in what districts they intended to make pilotage compulsory; and it may be doubted whether it was intended that s. 58 of the 6 Geo. 4, c. 125, should, under such circumstances as existed in this case, render compulsory the taking of a pilot. For it is very probable, looking at the general provisions of that act, which (like those of the 52 Geo. 3, c. 39) relate in substance to the Trinity House and Cinque Port districts only, and to the fact that the permission of the Trinity House or the Lord Warden is required by s. 58 before an additional penalty for any offence under it can be recovered, that this section was intended to be confined, notwithstanding the general words used in it, to the large and important districts under the jurisdiction of these two pilotage authorities, leaving all other districts under the operation of such local arrangements by statute or charter as were then in force. See the first and following sections of the act and s. 76. It will be observed that, although by this act the previously existing statutes relating to Trinity House and Cinque Port pilots are repealed, the then jurisdiction of all other pilotage

bodies under acts of parliament or charters is not disturbed; and it is provided by ss. 6 and 89 that the then existing powers of the Hull and Newcastle and other local pilotage authorities, acting under particular statutes and charters, shall be preserved. There is a difficulty in holding that the words "*port or place*" in s. 59 are to be construed in their widest sense, for provision had been made by charter or act of parliament for several centuries before the passing of the 6 Geo. 4, c. 125, for the appointment of pilots within the Trinity House and Cinque Port districts, and yet it was clearly not intended to exclude these districts from some of the exceptions to compulsory pilotage mentioned in s. 59. Very many of the exceptions in sect. 59 clearly can have no application except to the Trinity House and Cinque Port districts, and the exception relating to a ship whilst the same is within the limits of the port to which she belongs, the same not being a port or place in relation to which "*particular provision* hath been made by any act of Parliament or by any charter," cannot well have been intended to have any application to ports or places outside these districts, because an exception implies a rule, and it is difficult to understand how any rule rendering pilotage compulsory in ports or places outside these districts could be imposed in the absence of any particular provision by act of parliament or charter. But the Trinity House and Cinque Port districts included a large extent of seaboard, comprising many ports, and the 6 Geo. 4, c. 125, contained general provisions which rendered it in effect compulsory upon vessels to employ pilots throughout the whole extent of those districts, and it is submitted that the words in question were intended to exempt a vessel when within such districts from the obligation to employ a pilot so long as it was within its own port, unless there was some particular provision by act of parliament or charter regulating the employment of pilots in such port. It must be added that the construction of s. 59 of the 6 Geo. 4, c. 125, which is above suggested, is not consistent with *The Killarney*, *ubi sup.*, nor with the recent decision of Sir Robert Phillimore in *The Hankow*, 4 P. D. 197, where the Court held, although in opposition to the de-

passengers between any place situate in the United Kingdom or the islands of Jersey, Guernsey, Alderney, Sark or Man, and any other place so situate, to take pilots within all districts for which pilots are licensed (*t*).

A power was given to the Crown, by the 6 Geo. 4, c. 125, s. 60, to permit, with the advice of the Privy Council, vessels not exceeding sixty tons, and not having British registers, to be navigated without pilots on the same terms as British ships of the like burthen. And by the 3 & 4 Vict. c. 68, orders might be issued by the same authority enabling foreign vessels belonging to countries with which we had treaties of reciprocity, to be piloted, subject to certain conditions, and within particular limits, without employing a licensed pilot. These statutes have been repealed by the Merchant Shipping Repeal Act, 1854, but owing to the preservation, by sect. 353 of the Merchant Shipping Act, 1854, of the then existing exemptions from compulsory pilotage, it is not impossible that questions may still arise with reference to the class of ships mentioned above (*u*).

Foreign vessels under sixty tons.

It is provided *inter alia* by the 141st section of the Customs Laws Consolidation Act, 1876, that no foreign ships proceeding, either with cargo or passengers or in ballast, from one part of the United Kingdom to another, or from the islands of Guernsey, Jersey, Alderney, Sark or Man to the United Kingdom, or from the United Kingdom to any of the said islands, or from any of the said islands to any other of them, shall during the time she is so employed be subject to any higher or other rate of pilotage dues, or any other rules for the employment of pilots, or any other rules or restrictions whatsoever than British ships employed in like manner, any law, charter, special privilege or grant to the contrary notwithstanding (*x*).

Foreign ships employed in the coasting trade.

Queen's ships were exempted from the operation of the pro-

Exemption of Queen's ships, &c.

cision of Dr. Lushington in *The Stetten*, Br. & L. 199, that the master of a steamer belonging to the port of London and on a voyage from Australia with passengers on board was bound by compulsion of law to employ a Trinity House pilot within the limits of the port of London.

(*t*) *The Temora*, 1 Lush. 17; *The General Steam Navigation Company v. The London and Edinburgh Shipping Company*, reported in 2 Ex. Div. 467,

but not on this point.

(*u*) For the Orders in Council made under these provisions, see Appendix, "Orders in Council," p. 66. See also as to the exemptions from the compulsory Trinity House pilotage, *post*, Appendix, "Orders in Council," pp. 68—81; and Pilotage Table, p. 110.

(*x*) See Appendix, p. cxxvii, note (*x*).

visions as to compulsory pilotage contained in the 6 Geo. 4, c. 125 (*u*), and the part of the Merchant Shipping Act, 1854, which relates to pilotage does not apply to ships belonging to her Majesty (*x*).

Exemptions where no pilot has offered, or ship is in distress, or mooring, or docking.

By sect. 362 of the Merchant Shipping Act, 1854, an unqualified pilot may, within any pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot under the following circumstances; (that is to say,)

When no qualified pilot has offered to take charge of the ship, or made a signal for that purpose; or

When a ship is in distress or under circumstances making it necessary for the master to avail himself of the best assistance which can be found at the time (*y*); or

For the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where the act can be done by an unqualified pilot without infringing the regulations of the port or any orders which the harbour master is legally empowered to give (*z*).

Exemption under Merchant Shipping Act, 1862, of vessels passing through any pilotage district.

The Merchant Shipping Act Amendment Act, 1862, provides, by sect. 41, that the masters and owners of ships passing through the limits of any pilotage district in the United Kingdom, on their voyages between two places both situate out of such district, shall be exempted from any obligation to employ a pilot within such district, or to pay pilotage rates when not employing a pilot within the district: this exemption does not, however, apply to ships loading or discharging at any place situate within the district, or at any place situate above the district on the same river or its tributaries.

Exemption of vessels commanded by masters or mates having pilotage certificates.

A more important limitation to the compulsory employment of pilots than those already noticed was created by the 12 & 13 Vict. c. 38, which enabled masters or mates, upon obtaining satisfactory testimonials as to good conduct and sobriety, to submit themselves for examination by the Trinity House of Deptford Strond, or other pilotage authorities, and to obtain certificates of competency, which were annually renewable, and

(*u*) 6 Geo. 4, c. 125, s. 86.

(*x*) As to the meaning of these words, see *The Cybele*, 2 P. D. 224, 3 P. D. 8; the M. S. Act, 1854, s. 4.

(*y*) See 6 Geo. 4, c. 125, s. 71.

(*z*) See *ibid.*, s. 63; *R. v. Lamb*, 5 T. R. 76; *R. v. Neale*, 8 T. R. 241. See also *The Maria*, L. R., 1 A. & E. 358; *The Victoria*, L. R., Irish, 1 Eq. 336.

which enabled them to pilot their vessels within specified limits without the aid of a licensed pilot, and without subjecting themselves to a penalty (a). This statute was, however, repealed by the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), and the licensing of masters and mates is now regulated by the Merchant Shipping Act, 1854.

By sect. 340 of the last-mentioned act, a master or mate may, upon giving due notice and consenting to pay the usual expenses, apply to any pilotage authority to be examined as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner, within any part of the district over which the pilotage authority has jurisdiction; and if, on examination, he is found competent, a pilotage certificate is to be granted to him, containing his name, a specification of the ships in respect of which he has been examined, and a description of the limits within which he is to pilot them. This certificate enables the person named in it to pilot the ship or ships specified, of which he is acting as master or mate, within the limits described in it, without incurring any penalty (b).

Power of pilotage authorities to grant pilotage certificates to a master or mate to pilot his own ship or ship of his owner.

By sect. 341, these pilotage certificates are only in force for one year, unless renewed; which may be done by an indorsement under the hand of the secretary or other proper officer of the authority by whom they were granted.

By sect. 342, if upon complaint to the Board of Trade it appears that any pilotage authority has, without reasonable cause, refused or neglected to examine a master or mate who has applied to them, or, after he has passed the examination, has without reasonable cause refused or neglected to grant him a pilotage certificate, or that the examination of any master or mate has been unfairly or improperly conducted, or that any terms imposed or sought to be imposed are unfair or improper, or that any pilotage certificate has been improperly withdrawn, the Board of Trade may, if in its judgment the circumstances appear to require it, appoint persons to examine the master or mate, and if he is found competent may grant him a pilotage

(a) See, also, the 16 & 17 Vict. c. 129, ss. 14—16, now repealed by the 17 & 18 Vict. c. 120.

(b) To be effectual the certificate must not only be complete but must

be delivered to the pilot. *The Killarney*, Lush. 202. Pilotage authorities may make bye laws to fix the terms of granting these certificates. The M. S. Act, 1854, s. 333, *supra*, p. 252.

certificate upon such terms and conditions, and subject to such regulations, as the Board thinks fit; this certificate will have the same effect as if it had been granted by the pilotage authority, and will be in force for one year. It may be renewed, however, from year to year, either by the pilotage authority, or by the Board of Trade, and this renewal must be indorsed on it.

Sect. 343 provides for the payment and application of fees on the granting and renewal of these certificates.

By sect. 344, if at any time it appears to the Board of Trade, or to any pilotage authority, that a master or mate to whom a pilotage certificate had been granted has been guilty of misconduct, or has shown himself incompetent to pilot his ship, the Board or the authority (as the case may be) may withdraw the certificate.

Power of Board of Trade to grant similar certificates to master or mate of certain home trade ships.

By sect. 355, any master or mate of a ship which by the provisions of the 354th section of the act is made subject to compulsory pilotage as above mentioned, may apply to the Board of Trade for a certificate, and the Board must, on satisfactory proof of his having continuously piloted any ships within the limits of any pilotage district, or of any part thereof, for two years prior to the commencement of the act, or upon satisfactory proof by examination of his competency, or otherwise as it may deem expedient, grant to him, or indorse on any certificate of competency or service obtained by him under the third part of the act (c), a certificate to the effect that he is authorized to pilot any ships belonging to the same owner, and of a draught of water not greater than the draught therein specified within the limits in question. This certificate remains in force for such time as the Board of Trade directs, and enables the master or mate named in it to conduct the ships specified in it within the limits described to the same extent as if the above provision did not exist (d).

REMUNERATION OF PILOTS.

A pilot, when seeking compensation for his services, may, where no statute has intervened, be considered in most respects as an ordinary mariner; he could not, however, sue in the Admiralty Court for pilotage due in respect of work done within

(c) See *ante*, p. 113.

(d) This certificate can be granted only in the case of masters or mates of the home trade passenger vessels

mentioned in sect. 354, and the ownership of the vessel must be correctly described. *The Earl of Auckland*, Lush. 164, 387.

the body of a county, although he might if it was done on the high seas (*e*). Questions as to the amount of remuneration which pilots are entitled to receive have seldom arisen in this country, for the amount of these payments has been usually fixed by the statute, charter, or order in council under which the pilots have acted (*f*).

The Merchant Shipping Act, 1854, sect. 358, provides that, a qualified pilot demanding or receiving, or a master offering or paying to the pilot, any other rate in respect of pilotage services (whether greater or less) than the rate for the time being demandable by law, shall incur for each offence a penalty not exceeding 10*l.* (*g*). This restriction applies only to licensed pilots acting under ordinary circumstances (*h*).

It is a settled doctrine of the Admiralty, that a pilot is not bound to go on board a vessel in distress to render pilot service for mere pilotage reward (*i*); for the duties of pilotage extend usually only to the conducting a vessel into or out of port in the ordinary course of navigation; and therefore, where a vessel, from real or supposed danger, is seeking a port of safety out of the course of her intended voyage, a pilot, if engaged, may be entitled to additional remuneration in the nature of salvage (*j*).

By the Merchant Shipping Act, 1854, sect. 356, if a boat or ship, having a qualified pilot on board, leads a ship which has not a qualified pilot, when the latter ship cannot from particular circumstances be boarded, the pilot so leading is entitled to the full pilotage for the distance run as if he had actually been on board and had charge of her.

(*e*) *Ross v. Walker*, 2 Wilson, 264, and the remarks of Mr. Justice Story, in *The Anne*, 1 Mason (American) Rep. 509, and in *Hobart v. Drogan*, 10 Peters (American) Rep. 119. The jurisdiction of the Court of Admiralty, where not extended by statute, was founded, in cases of this description, on *marine* service. See the judgment of Lord Mansfield in *Howe v. Nappier*, 4 Burr. 1950; *The Adah*, 2 Hagg. 326; *The Bee*, 2 Dods. 498. The Vice-Admiralty Courts established under the "Vice-Admiralty Courts Act, 1863" (26 Vict. c. 24), have jurisdiction over claims in respect of pilotage. See sect. 10 of that act. It may be a question whether since the Judicature Acts the Admiralty Division has jurisdiction to entertain a suit for pilotage earned in the body of a county, but the question is of no practical importance, because

of the summary remedy given by the M. S. Act, 1854, s. 363.

(*f*) See *ante*, p. 250, n. (*g*).

(*g*) It is now provided by the M. S. Act, 1872, s. 9, that the Trinity House of Deptford Strond may, by byelaw sanctioned by Order in Council, repeal or relax the provisions of this section within the whole or any part of their district. See *post*, p. 275.

(*h*) *The Nelson*, 6 Rob. 227.

(*i*) *Per* Dr. Lushington, in *The Frederick*, 1 W. Rob. 17; *The Æolus*, L. R., 4 A. & E. 29; *The Anders Knappe*, 4 P. D. 213; *The Cherubim*, L. R., Irish, 2 Eq. 172; *The Clara*, 23 Wallace, 18.

(*j*) *The Elizabeth*, 8 Jur. 365. See also the judgment of Sir W. Scott, in *The Joseph Harvey*, 1 Rob. 306; *The Yonge Andries*, S.W. 229, 303, and *post*, Chap. SALVAGE.

By sect. 357, no pilot, except under circumstances of unavoidable necessity, may without his consent be taken to sea or beyond the limits for which he is licensed; a pilot so taken under circumstances of unavoidable necessity, or without his consent, is entitled, over and above his pilotage, to the sum of ten shillings and sixpence a day, to be computed from and inclusive of the day on which the ship passes the limit to which he was engaged to pilot her up to and inclusive of the day of his being returned in the ship to the place where he was taken on board, or up to and inclusive of such day as will allow him, if discharged from the ship, sufficient time to return thereto; and in the last-mentioned case he is entitled to his reasonable travelling expenses (*k*).

**RIGHTS AND
PRIVILEGES OF
QUALIFIED
PILOTS.**

By sect. 363, the following persons are liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained: the owner or master, or any consignees or agents who have paid or made themselves liable to pay any other charge on account of the ship in the port of her arrival or discharge, as to pilotage inwards, and in the port from which she clears out as to pilotage outwards; and in default of payment the pilotage dues may be recovered in the same manner as penalties of the like amount imposed by the act; but this recovery may not take place until the dues have remained unpaid for seven days after a demand has been made in writing.

By sect. 364, every consignee and agent (not being the owner or master) who is made liable by the act for the payment of pilotage dues may retain, out of any monies in his hands, received on account of the ship or belonging to her owner, the amount of all dues so paid, together with any reasonable expenses incurred by reason of the payment or liability.

By sect. 359, if a master, on being requested by a qualified pilot having the charge of his ship to declare her draught of water, refuses to do so, or makes himself, or is privy to any other person making, a false declaration to the pilot as to her draught, he incurs a penalty not exceeding double the amount of pilotage which would have been payable; and if a master or other person interested in a ship makes or is privy to any other

(*k*) The sums which the pilot is entitled to under this section are not "pilotage dues" within the meaning of those words as used in the M. S. Act, 1854, ss. 363, 364, and, therefore,

cannot be recovered from the ship-brokers of a foreign vessel in this country by virtue of the provisions of the act. *Mortuo v. Julian*, 4 C. P. D. 216.

person making a fraudulent alteration in the marks on the stern or stem post of his ship denoting her draught of water, the offender incurs a penalty not exceeding 500*l.* (*l*).

Although a pilot is in some respects in the position of an ordinary mariner, there is no implied contract between the owners of a ship and a pilot who they are compelled to employ that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants, and an action will lie by the pilot against the shipowners for injuries caused to him whilst acting as pilot on board their vessel by the negligence of their servants (*m*).

By the Merchant Shipping Act, 1854, sect. 365, if any qualified pilot commits any of the following offences; (that is to say,) OFFENCES OF
QUALIFIED
PILOTS.

- (1.) Keeps himself, or is interested in keeping by any agent, servant, or other person, any public-house, or place of public entertainment, or sells or is interested in selling any wine, spirituous liquors, tobacco or tea :
- (2.) Commits any fraud or other offence against the revenues of Customs or Excise, or the laws relating thereto :
- (3.) Is in any way, directly or indirectly, concerned in any corrupt practices relating to ships, their tackle, furniture, cargoes, crews or passengers, or to persons in distress at sea or by shipwreck, or to their moneys, goods or chattels :
- (4.) Lends his licence :
- (5.) Acts as pilot whilst suspended :
- (6.) Acts as pilot when in a state of intoxication :
- (7.) Employs or causes to be employed on board any ship of which he has the charge, any boat, anchor, cable, or other store, matter, or thing beyond what is necessary for the service of the ship, with the intent to enhance the expenses of pilotage for his own gain or for the gain of any other person :
- (8.) Refuses or wilfully delays, when not prevented by illness or other reasonable cause, to take charge of any ship within the limits of his licence upon the signal for a pilot being made, or upon being required to do so by the

(*l*) See the M. S. Act, 1871, s. 5 ;
the M. S. Act, 1873, s. 3.

(*m*) *Smith v. Steele*, L. R., 10 Q. B.
125.

master, owner, agent or consignee, or by any officer of the pilotage authority by whom the pilot is licensed, or by any principal officer of Customs :

- (9.) Unnecessarily cuts or slips or causes to be cut or slipped any cable belonging to any ship :
- (10.) Refuses, on the request of the master, to conduct the ship of which he has the charge into any port or place into which he is qualified to conduct her, except on reasonable ground of danger to the ship :
- (11.) Quits the ship of which he has the charge, without the consent of the master, before the service for which he was hired has been performed :

For each such offence, in addition to any liability for damages at the suit of the person aggrieved, he incurs a penalty not exceeding 100%, and is liable to suspension or dismissal by the pilotage authority by which he is licensed ; and every person who procures, abets, or connives at the commission of any of these offences incurs, in addition to this liability for damages, a penalty not exceeding 100%, and, if a qualified pilot, is liable to suspension or dismissal by the pilotage authority by which he is licensed.

By sect. 366, if a pilot, when in charge of any ship, by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of any person on board, or if any pilot, by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done for preserving the ship from loss, destruction, or serious damage, or for preserving any person belonging to or on board of her from danger to life or limb, the pilot so offending is guilty of a misdemeanor, and, if a qualified pilot, is liable to suspension and dismissal by the authority by which he is licensed.

By sect. 367, if any person, by wilful misrepresentation of circumstances upon which the safety of a ship may depend, obtains or endeavours to obtain the charge of her, he, and every other person procuring, abetting or conniving at the commission of the offence, incurs a penalty not exceeding 100%, in addition to any liability for damages at the suit of the party aggrieved. If the offender is a qualified pilot, he is also liable to suspension or dismissal by the pilotage authority which licensed him.

There are certain provisions in the Quarantine Act of 1825 which specially relate to pilots: Thus, on boarding any vessel coming from foreign parts, pilots are bound under that act to receive an account in writing from the master of the places at which his vessel loaded and at which he touched on his voyage, and of the articles composing his cargo; to bring to the vessel when required by any quarantine officer; and if there shall be in force any proclamation or order in council made after the departure of the vessel from the United Kingdom by which vessels coming from any place mentioned in the account received, or having on board any of the articles mentioned in such account, shall be liable to quarantine, to give notice of such proclamation or order to the master. Pilots are also bound by the act to remain on board any vessel liable to quarantine which they may have boarded in the same manner as any of the officers, crew or passengers, and not to go on shore, or go on board any other vessel or boat with intent to go on shore, until the vessel is regularly discharged from quarantine. If these provisions are neglected, the pilot is liable to prosecution (*n*).

Duties of pilots under Quarantine Act.

By sect. 360 of the Merchant Shipping Act, 1854, a qualified pilot may supersede an unqualified pilot, but the master must pay to the unqualified pilot a proportionate sum for his services, and may deduct the same from the charge of the qualified pilot; and in case of dispute the pilotage authority by which the qualified pilot is licensed is to determine the proportionate sums to which each party is entitled.

Statutory provisions relating to unqualified pilots.

By sect. 361, an unqualified pilot assuming or continuing in the charge of a ship after a qualified pilot has offered to take charge of her, or using a licence which he is not entitled to use for the purpose of making himself appear to be a qualified pilot, incurs a penalty not exceeding 50%.

Although many of the enactments already referred to relate to all pilotage districts, yet there are enactments which refer expressly to the districts under the jurisdiction of the Trinity House of Deptford Strond, and to these it is now proposed to direct attention.

TRINITY HOUSE PILOTAGE DISTRICTS.

The general powers and jurisdiction of the Trinity House of

(*n*) See 6 Geo. 4, c. 78, ss. 11, 12, 13, 17, (Suppl. App. p. 131), and App., "Orders in Council," pp. 84—88. A pilot is also liable to prosecution if he conducts a vessel liable to quarantine

under his charge to any other place than the place appointed for her reception; 6 Geo. 4, c. 78, s. 12. See also 39 & 40 Vict. c. 36, s. 234 (Suppl. App. p. 168).

Deptford Strond are regulated by Part V. of the Merchant Shipping Act, 1854, sects. 368 to 386 (o). We have already seen that by sect. 331 of that act all pilotage authorities retain their then existing powers and jurisdiction so far as they are consistent with the provisions of the statute (p).

Powers of
Trinity
House

By the Merchant Shipping Act, 1854, sect. 368, it is provided that the Trinity House may alter any of the provisions in the statute contained (and expressed to be subject to alteration by them), in the same manner and to the same extent as they might have altered the same if contained in any previous statute (q).

To appoint
pilotage sub-
commissioners

By sect. 369, the Trinity House may continue to appoint sub-commissioners to examine pilots in those districts for which

(o) Before the 16 & 17 Vict. c. 129, the jurisdiction over the Cinque Port pilots was, as we have seen, vested in the Society or Fellowship of the Cinque Port Pilots. This body was regulated in the first instance by the 3 Geo. 1, c. 13, and more recently by the 6 Geo. 4, c. 125, as amended by the 9 Geo. 4, c. 86, the 3 & 4 Vict. c. 68, and the 12 & 13 Vict. c. 88. These acts, except so much of the 16 & 17 Vict. c. 129 as transfers to the Trinity House the former jurisdiction of the Cinque Ports, are now repealed by the Merchant Shipping Repeal Act, 1854 (the 17 & 18 Vict. c. 120). They have been sometimes called General Pilot Acts, but this is not correct, since they applied generally only to the districts named in their preambles. See *The Attorney-General v. Cass*, 3 Price, 316, and *ante*, p. 261, note (e). The Trinity House has for centuries appointed pilots to conduct ships into, out of, and upon the Thames, through the North Channel, to or by Orfordness, and round the Long Sand Head, or through the Queen's Channel, the South Channel, or other channels, into the Downs, and from and by Orfordness, and up the North Channel, and up the Thames and Medway, and the creeks or channels belonging thereto. The first public act which regulated this corporation was the 5 Geo. 2, c. 20. The Cinque Port pilots were formerly entitled to pilot vessels from Dover, Deal, and the Isle of Thanet, up the Thames and Medway; but by the 9 Geo. 4, c. 86, (which amended the 6 Geo. 4, c. 125,) these pilots could not take charge of ships above, or westward of the landing place at Gravesend, or in the Medway westward of Standgate Creek, unless they were qualified and licensed

according to the latter act. It is now provided by the Merchant Shipping Repeal Act, 1854, s. 6, that the 4th and 9th sections of the 16 & 17 Vict. c. 129, shall be construed as if the 5th part of the Merchant Shipping Act, 1854, were therein referred to in lieu of the 6 Geo. 4, c. 125.

As to the payments to be made by the Cinque Port pilots to the Trinity House pilotage fund see the M. S. Act, 1872, s. 10. For the Orders in Council approving the more material bye-laws relating to the London District see Appendix, Orders in Council, pp. 68 to 81. For a list of the Trinity Out Port Districts see Appendix, "General Table of Pilotage Authorities in England and Wales," p. 110.

(p) *Supra*, p. 251. The Trinity House of Leith has no authority to grant pilotage licences within the jurisdiction of the Trinity House of Deptford Strond. *Hosack v. Gray*, 6 B. & S. 598.

(q) See the 6 Geo. 4, c. 125, ss. 8, 11, 26, 51 and 16 & 17 Vict. c. 129, ss. 21, 23. Under the first of these statutes the Trinity House was empowered to vary the rates of pilotage for those districts which are known as the Out Port districts without the consent of the Crown in Council. The reason for this distinction was, apparently, that in these districts no statutory table of rates then was or has since been established. This power still exists. For, although the above-mentioned statutes are repealed, their provisions in this respect are substantially incorporated in the M. S. Act, 1854, by the operation of s. 331 of that statute. See *ante*, p. 250, note (e).

they formerly appointed, and, by consent of the Queen in Council, for other districts in which no particular provision (g) is made by any act of Parliament or charter for the appointment of pilots; but no pilotage district already under the authority of any sub-commissioners appointed by the Trinity House is to be extended, except with such consent; and no sub-commissioners so appointed are to be deemed to be pilotage authorities within the meaning of the act.

By sect. 370, the Trinity House are to continue, after due examination by themselves or their sub-commissioners, to appoint and license under their common seal pilots for the purpose of conducting ships within the limits following, or any portion of these limits; (that is to say,)

- (1.) "The London district," comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south; but so, that no pilot shall be hereafter licensed to conduct ships both above and below Gravesend:
- (2.) "The English Channel district," comprising the seas between Dungeness and the Isle of Wight.
- (3.) "The Trinity House Out Port districts" (r), comprising any pilotage district for the appointment of pilots within which no particular provision (s) is made by any act of Parliament or charter.

By sect. 371, subject to any alteration to be made by the Trinity House, the names of all pilots licensed by the Trinity House are to be published in manner following; (that is to say,)

- (1.) The Trinity House, at their house in London, are to fix up a notice specifying the name and usual place of abode of every pilot so licensed, and the limits within which he is licensed to act:
- (2.) The Trinity House are to transmit a copy of this notice to the Commissioners of Customs in London, and to the principal officers of Customs resident at all ports within

(r) For a list of the Trinity Out Port Districts see Appendix, "General Table of Pilotage Authorities in England and Wales," p. 111; and see *The Juno*, 1 P. D. 135.

(s) As to what amounts to a particular provision within this section see *Hadgraft v. Hewith*, L. R., 10 Q. B. 350.

(TRINITY
HOUSE DIS-
TRICTS).

any alteration to be made by the Trinity House (*a*), and to the exemptions afterwards contained in the act, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are declared to be the London district and the Trinity House Out Port districts; and the master of every ship navigating within any part of these districts, who, after a qualified pilot has offered to take charge of the ship, or has made a signal for that purpose, either himself pilots the ship, without possessing a certificate enabling him so to do (*b*), or employs or continues to employ an unqualified person to pilot her, incurs for every offence (in addition to the penalty hereinbefore mentioned) an additional penalty not exceeding 5*l*. for every fifty tons burthen of the ship, if the Trinity House certify in writing under their common seal that the prosecutor is to be at liberty to proceed for the recovery of this additional penalty (*c*).

By sect. 377 it is provided, that, subject to any alteration to be made by the Trinity House, a sufficient number of qualified pilots must always be ready to take charge of ships coming from the westward past Dungeness; and the Trinity House, by bye-law to be made in the same manner as other bye-laws made under the powers contained in the act (*d*), are bound to make such regulations with respect to the pilots under their control as may be necessary in order to provide for an unintermitted supply of qualified pilots for these ships, and to insure their constant attendance upon and due performance of their duty, both by night and day, whether by cruising between the South Foreland and Dungeness, or by going off from shore upon signals made for the purpose, or by any other means, and whether in rotation or otherwise, as the Trinity House may think fit (*e*).

(*a*) See *supra*, p. 272, and Appendix, "Orders in Council," pp. 68—80. The 51st section of the 6 Geo. 4, c. 125, gave the Trinity House power to make regulations with respect to the regulation of the pilotage or the exemption from pilotage of small foreign vessels coming to the port of London with provisions. It would seem that the power conferred by this section, so far as it is not inconsistent with the M. S. Act, 1854, is kept alive by the provisions of the M. S. Act, 1854, s. 331.

(*b*) The regulations under which the Trinity House grant pilotage certificates to masters and mates will be found in the Appendix, pp. 71, 73.

(*c*) See the M. S. Act, 1854, s. 353, *supra*, p. 259.

(*d*) See sects. 332, 333.

(*e*) The regulations made by the Trinity House under the provisions of the 6 Geo. 4, c. 125, for insuring the good conduct and constant attendance of the pilots licensed by them, and for enforcing the general purposes of that act, and which were approved by Chief Justice Abbott on the 19th April, 1826, are for the most part still in force. See Kay, Shipmaster and Seamen, vol. 2, p. lxxv. The service of the Channel pilots at Gravesend is governed by regulations which came into force on the 8th of April, 1867. By regulations dated the 28th October, 1853, it is provided that when a vessel in charge of a Trinity House pilot touches the ground or comes into collision with

By sect. 378, subject to any alteration to be made by the Trinity House, every master of a ship coming from the westward, and bound to any place in the rivers Thames and Medway, must (unless she has a qualified pilot on board, or is exempted from compulsory pilotage), on the arrival of the ship off Dungeness, and thenceforth until she has passed the south buoy of the Brake, or a line to be drawn from Sandown Castle to this buoy, or until a qualified pilot has come on board, display and keep flying the usual signal for a pilot (*f*); and if any qualified pilot is within hail, or is approaching and within half a mile, and has the proper distinguishing flag flying in his boat (*g*), the master must, by heaving to in proper time, or shortening sail, or by any practicable means consistent with the safety of the ship, facilitate the pilot's getting on board, and give the charge of the ship to him; or if there are two or more pilots offering at the same time, to such one of them as may, according to the regulations for the time being in force, be entitled or required to take the charge; and if any master fails to display or keep flying the usual signal for a pilot, or to facilitate the pilot's getting on board, or to give him the charge of the ship, he incurs a penalty not exceeding double the sum which might have been demanded for the pilotage.

By sect. 379, the following ships, when not carrying passengers (*h*), are exempted from compulsory pilotage in the London district, and in the Trinity House Out Port districts (*i*).

EXEMPTIONS
FROM COMPUL-
SORY PILOTAGE
(TRINITY
HOUSE DIS-
TRICTS).

- (1.) Ships employed in the coasting trade of the United Kingdom (*k*):

another vessel, the pilot is to report the circumstances to the Trinity House in writing according to a prescribed form. A regulation dated July, 1862, requires a similar report to be sent in when a vessel in charge of a Trinity House pilot has lost her anchors or chains.

(*f*) It is provided by the 16th section of the M. S. Act, 1873, that if a vessel requires the services of a pilot the signals to be used shall be those specified in the second schedule to that act. See Appendix, p. cccxxvi.

(*g*) See sect. 346, and *supra*, p. 258.

(*h*) The payment of a fare is necessary to constitute a passenger within the meaning of this section. *The Lion*, L. R. 2 P. C. 525; *The Hanna*, L. R., 1 A. & E. 283.

(*i*) The exemptions under the former act (6 Geo. 4, c. 126) will be found in ss. 58—62. It has been held that these exemptions are not affected by the exemptions contained in the M. S. Act, 1864, s. 379, and that so far as they are applicable and are not contrary to the express provisions of the M. S. Act, 1864, they are still in force. See *supra*, p. 261, note (*s*), and *infra*, p. 279, note (*p*). See also pp. 279—280, where the general exemptions which have been created by the Trinity House since 1853, are enumerated. See further *Peake v. Screech*, 7 Q. B. 603; *Williams v. Newton*, 14 M. & W. 747—decisions on sect. 62 of the 6 Geo. 4, c. 126.

(*k*) *Hadgraft v. Hewith*, L. R., 10 Q. B. 350. It has been held, that where a

Under M. S.
Act, 1854.

- (2.) Ships of not more than sixty tons burthen (l) :
- (3.) Ships trading to Boulogne or to any place in Europe north of Boulogne (m) :
- (4.) Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone being the produce of those islands :
- (5.) Ships navigating within the limits of the port to which they belong (n) :
- (6.) Ships passing through the limits of any pilotage district on their voyages between two places both situate out of these limits, and not being bound to any place within these limits, nor anchoring therein.

By sect. 41 of the Merchant Shipping Act, 1862, this last exemption has been extended to all ships (o).

vessel, which was ordinarily occupied in foreign trade, was employed in taking a cargo from Liverpool to London, with a view of sailing from the latter port with a fresh cargo on a foreign voyage, she could not be considered as within this exemption. *The Lloyds*, Br. & L. 359. See, further, the 6 Geo. 4, c. 125, s. 59. In a case which was decided upon a somewhat similar provision contained in the Liverpool Pilot Act, 5 Geo. 4, c. lxxiii. s. 25, which allows ships "in ballast in the coasting trade" to proceed without a pilot, it was held that a vessel which had come from Calcutta to London, and had there discharged her cargo, and was proceeding in ballast to Liverpool, was not within the exception; *The Agricola*, 2 W. Rob. 10. As to foreign vessels employed in the coasting trade, see 39 & 40 Vict. c. 36, s. 141, *supra*, p. 263.

(l) See the 6 Geo. 4, c. 125, s. 60, Appendix, "Orders in Council," p. 66, and *supra*, p. 263.

(m) *The Lion*, L. R., 2 P. C. 525; *The Hanna*, L. R., 1 A. & E. 283, and the Order in Council of the 21st of December, 1871, referred to *infra*, p. 280, note (r). According to the decided cases, most, if not all, of the ships to which this sub-section refers are by the operation of the 333rd section of the M. S. Act, 1854, and the provisions of the 59th section of the 6 Geo. 4, c. 125, and an Order in Council of the 18th February, 1854 (Appendix, p. 68), exempted from compulsory pilotage within the London

district, whether they are carrying passengers or not. See *The Earl of Auckland*, Lush. 164, 387; *The Wesley*, Lush. 268, and *The Hanna*, L. R., 1 A. & E. 283. This sub-section applies to inward as well as to outward voyages. *The Wesley*, *ubi sup.*

(n) See the earlier act, 6 Geo. 4, c. 125, s. 63, the provisions of which were more limited, and the decisions upon it in *Thornton v. Boland*, 2 Bing. 219, and *M'Intosh v. Slade*, 6 B. & C. 657. The words "navigating within," in the M. S. Act, 1854, s. 379, mean being within; and, therefore, a vessel belonging to the port of London, not carrying passengers and coming from the west, is not bound to employ a licensed pilot when she is within the limits of the port of London. *The Stettin*, Br. & L. 199. It has recently been decided that the exemption contained in 6 Geo. 4, c. 125, s. 59, enabling masters to pilot their own vessels within the limits of the ports to which they belong and in relation to which no particular provisions have been made for the appointment of pilots, is not applicable to the port of London. *The Hankow*, 4 P. D. 197, and *supra*, p. 261, note (e). The port of London for pilotage purposes extends to Gravesend. *The General Steam Navigation Co. v. The British and Colonial Steam Navigation Co.*, L. R., 4 Ex. 238.

(o) See *supra*, p. 264; see also the Order in Council of the 18th February, 1854, Appendix, "Orders in Council," p. 68.

It must not be forgotten that it has been established by decided cases that in addition to the exemptions from compulsory pilotage which are specified in the 379th section of the Merchant Shipping Act, 1854, such of the exemptions as were created by the 6 Geo. 4, c. 125, and are not contrary to the express provisions of the Merchant Shipping Act, 1854, are, by virtue of the 353rd section of the Merchant Shipping Act, 1854, still in force within the pilotage districts of the Trinity House (*p*). Under 6 Geo. 4, c. 125.

It has likewise been held that the exemptions which are contained in an Order in Council of the 18th of February, 1854, confirming a bye-law of the Trinity House, and extending the exemptions contained in the 59th section of the 6 Geo. 4, c. 125, to vessels trading to Norway, the Cattegat, the Baltic, round the North Cape, or into the White Sea, when coming up by the South Channels, and to vessels trading between Boulogne and the Baltic on their outward passages, and when coming up by the South Passages, are still in force within the London Pilotage District (*q*).

Since the passing of the Merchant Shipping Act, 1854, the Trinity House have, by bye-laws made with the consent of her Majesty in Council, under the 332nd section of that act, exempted the following ships, *when not carrying passengers*, from compulsory pilotage within the London, and the Trinity Out Port, districts:—Ships navigating in ballast between places in the United Kingdom (*r*), and ships trading from any port or place in Great Britain, within the London district, or any of the Under bye-laws.

(*p*) See *The Earl of Auckland*, Lush. 166, 387; *The Temora*, Lush. 17; *The Hankow*, 4 P. D. 197, and *supra*, p. 260, and p. 261, note (*s*). It is not easy to follow the reasoning of the cases, and it is submitted that it was the intention of the framers of the M. S. Act, 1854, to comprise all the regulations with reference to compulsory pilotage in the *Trinity House Districts* in sects. 376—379 of that act, and that the provisions in sect. 353 were intended to apply only to places outside of the pilotage districts of the Trinity House. The exemptions relating to ships in the Trinity House Districts contained in sect. 379 of the M. S. Act, 1854, are nearly the same as the exemptions contained in the 6 Geo. 4, c. 125, save that the former exemptions are expressly declared to apply only to ships *when not*

carrying passengers. Yet the result of the construction put by the decided cases upon the two statutes is to render the words "when not carrying passengers" contained in the 379th section of the M. S. Act, 1854, of no effect. Possibly the cases may some day be re-considered by an appellate tribunal.

(*q*) See *The Hanna*, L. R., 1 A. & E. 283, and Appendix, "Orders in Council," p. 68.

(*r*) See Order in Council of the 25th July, 1861, Appendix, p. 73. A byelaw of the Trinity House, approved by Order in Council of the 28th of November, 1855, and now virtually superseded by the above Order of the 25th of July, 1861, exempted vessels in ballast from compulsory pilotage on certain conditions therein mentioned.

Trinity House Out Port districts to the port of Brest, or any port or place in Europe north and east of Brest, or to the islands of Guernsey, Jersey, Alderney, Sark or Man, or from Brest, or any port or place in Europe north and east of Brest, or from the islands of Guernsey, Jersey, Alderney, Sark or Man, to any port or place in Great Britain within either of the said districts (r).

TRINITY
HOUSES OF
NEWCASTLE
AND HULL.

By the Merchant Shipping Act, 1854, sect. 387, the Trinity Houses of Newcastle and Hull are to continue to appoint sub-commissioners of pilotage, not exceeding a certain number; but it is provided, that these sub-commissioners are not to be deemed pilotage authorities within the meaning of the act (s).

LIABILITY OF
PILOT FOR
NEGLECTANCE,
&c.

At common law a pilot would be liable for any injury done to another vessel by reason of his misconduct or negligence (t); as, however, pilots under the jurisdiction of the Trinity House of London are required to enter into a bond to observe the bye-laws and regulations which may be made by that corporation, it has been thought reasonable to limit the liability of these pilots in cases of negligence to the amount of the penalty of this bond.

The Merchant Shipping Act, 1854, sect. 373, provides, therefore, that a qualified pilot who has executed this bond shall not be liable for neglect or want of skill beyond its penalty and the amount of pilotage payable to him for the voyage on which he is engaged (u). We have already seen that this statute contains clauses relating to qualified pilots generally which impose upon them a criminal liability in respect of wilful breaches of duty and neglects of duty causing injuries to or tending to the injury of the ship or of those on board; and that there are also

(r) See Order in Council of the 21st of December, 1871, Appendix, p. 78.

(s) For the pilotage jurisdiction of these corporations, see "The General Table of Pilotage Authorities in England and Wales," Appendix, p. 110.

(t) *Stort v. Clements*, Peake, 107. It has been held in Scotland that when harbour trustees, who are appointed "a pilotage authority" under the M. S. Act, 1854, do not license pilots under the powers conferred on them by Part V. of that act, but employ unlicensed pilots at stated wages to pilot vessels into their harbour, and

themselves receive the pilotage dues and apply them to harbour purposes, they are liable for the fault of the pilots so employed by them. *Holman v. The Irvine Harbour Trustees*, 4 Sess. Ca. (4th Series), 406.

(u) See the former act, the 6 Geo. 4, c. 125, s. 57, which contains a similar provision. Prior to the Judicature Acts it was held that the Admiralty Court had not jurisdiction to entertain a suit for negligence against a licensed Liverpool pilot. *The Alexandria*, L. R., 3 A. & E. 575; see also *Flower v. Bradley*, 44 L. J., Ex. 1.

numerous offences mentioned in the statute in detail to which penalties are attached (*x*).

Important questions have frequently arisen as to the extent to which masters or owners are liable for injuries occasioned by the negligence or want of skill of the pilot whom they have employed (*y*).

MASTERS AND OWNERS EX-EMPTED FROM LIABILITY FOR ACTS OF PILOT.

With regard to the liability of owners or masters for the acts of the pilot employed by them; the owners would, at common law, be liable for the consequences of all the tortious or negligent acts of the pilot done within the scope of his agency (*z*). The master, however, being an intermediate agent, would not be liable to his owner for the wrongful acts of the pilot (*a*). Whether he would be liable to a stranger, as for instance, to a person against whose vessel the ship might strike, through the negligence of the pilot, has been doubted (*b*). The better opinion, however, is that he would not be liable (*c*). The general question is not, however, of much importance, since very few cases of this description can now occur, in which the pilot is not acting under the provisions of some statute limiting or defining the liability of the master and owner.

At common law.

Independently of legislative provision, the Courts of law have always considered, as indeed justice required, that wherever the employment of a pilot was compulsory, that is to say, where if one was not employed a statutory penalty was incurred, the owners and master were not liable for injuries arising from his acts; for in these cases it was deemed that their authority was superseded by legislative enactment and that it was unjust to hold them responsible for the skill, sobriety, and

(*x*) See *ante*, p. 269, and the M. S. Act, 1854, ss. 365—367.

(*y*) The Pilot Act, 6 Geo. 4, c. 125, s. 53, exempted owners and masters from liability for any loss or damage which might happen in consequence of there being no licensed or qualified pilot on board, unless it was proved that the want of a pilot arose from a refusal to take him on board, or from the wilful neglect of the master in not heaving to, or using all practicable means consistent with the safety of the vessel, to take on board any pilot who might have offered his services. This act also expressly provided that nothing contained in it should affect the remedy

which any person might have in such cases upon any insurance or other contract, unless it was proved that the omission to take a pilot arose from the refusal or wilful neglect of the master; see s. 56. These provisions are omitted in the M. S. Act, 1854.

(*z*) See *ante*, pp. 158, 159.

(*a*) *Aldrich v. Simmons*, 1 Stark. 214.

(*b*) *Boucher v. Noidstrom*, 1 Taunt. 568, where the master was held not to be liable. In that case, however, the pilot was acting beyond the scope of his employment.

(*c*) See 3 Kent Com. 176, and the American authorities there referred to, and *The Eden*, 2 W. Rob. 442.

caution of one whom they had not selected, and who could not be regarded as their servant or agent (*d*).

This principle is applied when the collision takes place in foreign waters where the employment of the pilot is compulsory, and even though the law of the foreign country may expressly provide that the circumstance of the employment of the pilot being compulsory shall not exempt the owner of the ship from liability for his acts, because the Courts of this country will not render a defendant liable for acts which are done by a person who is not his servant or agent (*e*).

Where the law does not subject the master to any penalty, but only to payment of the pilot's allowance on refusal to take him, it seems that the employment of a pilot is still to be regarded as compulsory, and the shipowner to be exonerated from liability (*f*).

Under M. S.
Act, 1854.

The Merchant Shipping Act, 1854, expressly provides, by sect. 388, that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of the ship (*g*) within any district where the employment of the pilot is compulsory by law (*h*).

(*d*) *Carruthers v. Sydebotham*, 4 M. & S. 77; *Bennet v. Moita*, 7 Taunt. 258; *The Maria*, 1 W. Rob. 95; *The Annapolis*, Lush. 295; *The Agricola*, 2 W. Rob. 10; *The Montreal*, 17 Jur. 538. In America, it has been held in some cases that the owners were liable, although the employment of the pilot was compulsory. See Story on Agency, s. 456 *a*, note; *The China*, 7 Wallace, 58, and *Sherlock v. Allen*, 3 Otto (American) Sup. Court Rep. 99; see also the observations of Lord Stowell as to this rule of law in *The Neptune the Second*, 1 Dods. 467; and of Sir Robert Phillimore in *The Halley*, L. R., 2 A. & E. 3; *S. C.*, reversed on appeal, L. R., 2 P. C. 193; and *The Hibernian*, L. R., 4 P. C. 511. On the same principle, where the master of a ship is compelled by law to obey the orders of a dock master, neither the owners nor the master are liable for any damage that may be occasioned by carrying out such orders. See *The Bilbao*, Lush. 149; *The Belgic*, 2 P. D. 57; *The Cynthia*, 2 P. D. 52.

(*e*) *The Halley*, L. R., 2 P. C. 193.

(*f*) *The City of Cambridge*, L. R., 4

A. & E. 161; 5 P. C. 551; *The Hibernian*, L. R., 4 P. C. 511; *The Princeton*, 3 P. D. 90. The *Attorney-General v. Case*, 3 Price, 302, is sometimes cited as an authority against the proposition laid down in the text, but the case was decided on other grounds. See the judgment of Dr. Lushington in *The Maria*, 1 W. Rob. 95, 101. The owner's exemption from liability is not affected by the fact that the master can select from a number of pilots. *The Hibernian*, L. R., 4 P. C. 511; and see *Martin v. Temperley*, 4 Q. B. 298, where, however, it was held that the same principle was not applicable with respect to the compulsory employment of licensed Thames watermen, as the selection of the owner in that case was practically unlimited.

(*g*) A qualified pilot employed by compulsion of law on board a ship in tow of a steam-tug is not, although the navigation of the tug is under his sole control, acting in charge of her within this enactment. *The Mary*, 5 P. D. 14.

(*h*) See the former act, 6 Geo. 4, c. 125, s. 55, and *The Lion*, L. R., 2 A. & E. 102; 2 P. C. 525. In *Ritchie v. Boussfield*, 7 Taunt. 309, which was de-

This exemption from liability is applicable to those cases only in which the employment of the pilot by whose fault or incapacity the damage is occasioned was compulsory, and does not extend to cases where a pilot has in fact been employed within his district, although it was not compulsory to employ him (i).

cided upon a somewhat similar provision contained in sect. 30 of the 52 Geo. 3, c. 39, it was argued, but not successfully, that the statute did not apply to protect the owner or master from being answerable for injuries done to the vessels of others. The 6 Geo. 4, c. 125, precluded all question on this point by using the words "to any person or persons whomsoever." The former Acts, 52 Geo. 3, c. 39, s. 30, and 6 Geo. 4, c. 125, s. 55, exempted owners and masters from liability in those cases only in which the pilot was "acting under or in pursuance of" the acts; hence a question arose as to whether the exemption applied to all pilotage districts, or only to those named in the preamble of the statutes. See *The Attorney-General v. Case*, 3 Price, 802; *Carruthers v. Sydebotham*, 4 M. & S. 77; *Dodds v. Embleton*, 9 Dowl. & Ry. 27; *The Tyne Improvement Commissioners v. The General Steam Navigation Co.*, L. R., 2 Q. B. 65; see also *Beilby v. Scott*, 7 M. & W. 93, and the observations on this case, and on *Carruthers v. Sydebotham*, in the judgment of Dr. Lushington in *The Eden*, 10 Jur. 296; *S. C.*, 4 Notes of Cases, 460, and in *The Agricola*, 2 W. Rob. 19. The wider and more distinct words of the M. S. Act, 1854, "within any district where the employment of such pilot is compulsory by law" admit of no similar doubt.

Sect. 96 of the Thames Conservancy Act, 1857, enacts that the owner of every vessel navigating the Thames shall be answerable for all trespasses, damages, spoil or mischief that shall be done by such vessel or by any of the boatmen or other persons belonging to or employed in or about the same, by any means whatsoever to any of the property or effects of the Conservators, &c., and that the owner of every such vessel shall for every such trespass, &c., upon conviction before a justice, pay such compensation as shall be fixed by him, not exceeding 20*l.* besides costs, but that in case the damage shall exceed 20*l.* the owner may be sued. And sect. 97 provides that the boatman or other person so offending as aforesaid shall be answerable for, and shall repay all,

such damages, &c., to his master or owner. Although these words are general, they do not repeal by implication sect. 388 of the M. S. Act, 1854, and in the Thames, as elsewhere, the owners of ships are not answerable for the acts of a pilot employed by compulsion of law. See *The Conservators of the River Thames v. Hall*, 3 L. R., C. P. 415.

(i) This is clear from the words of the section. See also *The Earl of Auckland*, Lush. 164, 387. It has been held that the words of the 388th section of the M. S. Act, 1854, in order to exempt the owners from liability, do not require that the pilot should be compulsorily employed at the place where the collision happened; it is enough that the pilot was actually in charge of the ship at the time when the collision happened, and within a district in which it was compulsory to place him in charge of the ship. *The General Steam Navigation Co. v. The British and Colonial Steam Navigation Co.*, L. R., 3 Ex. 330, 4 Ex. 238; *The Lion*, L. R., 2 P. C. 531. The language of the 6 Geo. 4, c. 125, s. 55, was more general, and exempted owners and masters where the damage arose from the incapacity of "any licensed pilot acting in charge of any such ship or vessel, under or in pursuance of any of the provisions of the act." Under these words it was held that if a ship was within a district to which the act applied, the protection existed not only in those cases in which it was compulsory to take a pilot on board, but also where a pilot had been taken on board, and was forced to serve if called upon, but the master was not bound to employ him. *Lucy v. Ingram*, 6 M. & W. 302; *The Fama*, 2 W. Rob. 184. And where a steam tug came in contact with and injured a ship, and it was proved that the crew of the former had been guilty of no negligence, and had obeyed the orders of a licensed pilot on board the vessel which she was towing, it was held that, as the pilot had been taken on board in pursuance of the statute, the owner was not liable. *The Duke of Sussex*, 1 W. Rob. 270; see, also, *The Mary*, 5 P. D. 14. It

This provision applies as well to the proceedings *in rem* in the Admiralty Division, as to actions at law (*j*).

Evidence
necessary to
establish
exemption.

Before an owner or master can claim the benefit of the exemption given by the statute, he must adduce some affirmative proof to show not only that a pilot was on board, but that the pilot had taken upon himself the management of the ship (*k*), and that the pilot's fault occasioned the injury (*l*). At one time it was held, that if a collision happened whilst a licensed pilot was on board it was to be presumed that the damage was occasioned by his negligence (*m*). But it is now clear that the object of the statutory exemption in favour of owners and masters is to

was decided also that the protection did not the less exist by reason of the pilot being in the permanent employment of the owner, provided he was duly licensed. *The Batavier*, 2 W. Rob. 407; 4 Notes of Cases, 356; *S. C.*, 10 Jur. 19; and see *The Hibernian*, L. R., 4 P. C. 511, decided under the M. S. Act, 1854.

(*j*) The 6 Geo. 4, c. 125, as well as the 5 Geo. 2, c. 20, provided that nothing contained in them should affect or impair the jurisdiction of the Court of Admiralty. In consequence of this, considerable difference of opinion arose as to the effect upon proceedings in that Court of the clauses which protected owners and masters. In a suit which was brought for damage done by a foreign vessel whilst going down the Thames under the charge of a licensed pilot, it was held that the exemption from responsibility given by the act to owners and masters was restricted to the Municipal Courts, in which the remedy is against the parties, and that the remedy against the vessel herself still existed in the Admiralty Courts, which, acting on the law of nations, have always exercised in these cases a jurisdiction which was not taken away in terms by the statutes; and it was doubted whether the provisions of the Pilot Act applied to foreign vessels, which, when outward bound, could not be compelled to take a pilot on board. *The Girolamo*, 3 Hagg. 169. This decision related to a foreign vessel; the reasons given in the judgment apply, however, equally to vessels of this country, and in some other cases it was held, that even with respect to these vessels the liability of the owners in the Court of Admiralty was not affected by the statute. See *The Neptune the Second*, 1

Dods. 467; *The Transit*, March 17, 1838, reported 1 Monthly Law Magazine, 582. But in a later case, where the question arose with respect to an English vessel, it was held that the responsibility of the owners in the Admiralty Court was limited by the statute. *The Protector*, 1 W. Rob. 45; see also *The Maria*, *ib.* 95; *The Agricola*, 2 W. Rob. 10. In these decisions, in one of which an elaborate judgment was given, no notice was taken of *The Girolamo*, *ubi sup.* See also *The Vernon*, 1 W. Rob. 316, a decision which seems to assume the correctness of the ruling in *The Protector*, *ubi sup.* In another case it was held that the statute applied as well to foreign vessels when proceeded against in the Admiralty Court, as to those of this country; *The Christiana*, 2 Hagg. 183. Although with respect to foreign vessels the question was open to some doubt, with regard to English vessels the statute clearly applied as well to proceedings *in rem* in the Admiralty Court as to suits *inter partes*. See the judgment of the Privy Council in *The Diana*, 4 Moo. P. C. C. 11, 21, and *The Wild Ranger*, Lush. 553; 32 L. J., P. M. & A. 49. In the M. S. Act, 1854, it will be seen that there is no such exception.

(*k*) *Catts v. Herbert*, 3 Stark. 12; *The Mobile*, Swa. 69, 127; *The City of Cambridge*, L. R., 5 P. C. 46; *Clyde Navigation Commissioners v. Barclay*, 1 App. Cases, 790.

(*l*) *The Protector*, 1 W. Rob. 56; *The Diana*, *ib.* 131; *Clyde Navigation Commissioners v. Barclay*, 1 App. Cases, 790.

(*m*) *Bennet v. Moita*, 7 Taunt. 258; see also *Ritchie v. Bougfield*, 7 Taunt. 309.

protect them in those cases only in which the pilot alone is the author of the injury (*n*), and that the burden of proving that the damage was occasioned by the fault of the pilot lies on the owner of the ship (*o*). When, however, the shipowners have proved fault on the part of the pilot sufficient to cause the collision, they are not to be called on to adduce proof of a negative character to exclude the mere possibility of contributory negligence on their part. But if in the course of the evidence negligence on the part of the crew is established, it then becomes incumbent upon the owners to show that the negligence of the crew in no way contributed to the collision (*p*).

It must be remembered that a ship is under the orders of a pilot for the purposes of navigation only, and that the mere fact of taking a pilot on board, where it is compulsory to do so, does not exonerate the master and crew from the proper observance of their own duty (*q*); therefore, to enable a master to screen himself from liability by setting up neglect on the part of the pilot, he must show that the act complained of was one within the duties which properly attach to the latter, and not one which being connected with the general management of the ship falls to the share of the master, even although there be a pilot on board. Thus in one case where a bad look out had been kept by the master and crew (*r*), and in another, where the

Where act not
within pilot's
duty.

(*n*) *Rodrigues v. Mellish*, 10 Exch. 110; *Hammond v. Rogers*, 7 Moo. P. C. C. 160, on appeal from *The Christiana*, 2 Hagg. 183. It was held in this case that the owners were not protected if blame could be imputed as well to the pilot as to the master and crew. The point was not raised in the Court of Admiralty. See also the judgment of Dr. Lushington, in *The Protector*, 1 W. Rob. 64; *The Admiral Boxer*, Swa. 193; *The Mobile*, *ib.* 69; *The Batavier*, 1 Spks. 378; 1 Moo. P. C. C. 286; and *The Schwalbe*, Lush. 239, on appeal nom. *The North German Lloyd Steam Ship Co. v. Elder*, 14 Moo. P. C. C. 241.

(*o*) *The Lochlibo*, nom. *Pollok v. McAlpin*, 7 Moo. P. C. C. 427; *The Carrier Dove*, Br. & L. 113; *The Ocean Wave*, L. R., 3 P. C. 208.

(*p*) *Clyde Navigation Commissioners v. Barclay*, 1 App. Cas. 740. And see the cases cited above; also *The Mobile*, Swa. 69; *S. C.* on appeal, *ib.*

127; 10 Moo. P. C. C. 467, nom. *Bates v. Don Pablo Sora*; *The Borussia*, Swa. 94; *The General de Caen*, Swa. 9; the judgments of Sir J. Nicholl, in *The Girolamo*, 3 Hagg. 176; and in *The Diana*, 1 W. Rob. 131; *S. C.*, before the Privy Council, *Stuart v. Isomonger*, 4 Moore, P. C. C. 11; *The Massachusetts*, 1 W. Rob. 371; *The Atlas*, 2 W. Rob. 502; 5 Notes of Cases, 50; and *The Ripon*, 6 Notes of Cases, 245. Many of these decisions, although upon the earlier acts, are applicable to the statutes now in force. See *The George*, 4 Notes of Cases, 163; *S. C.*, 9 Jur. 672; see also *The Maria*, L. R., 1 A. & E. 358.

(*q*) *Per* Dr. Lushington, in *The Diana*, 1 W. Rob. 135. See also *ante*, p. 283, note (*i*); *The Queen*, L. R., 1 A. & E. 354.

(*r*) *The Velasquez*, L. R., 1 P. C. 494; *The Diana*, 1 W. Rob. 131; 4 Moo. P. C. C. 11.

evidence showed that, after a collision had occurred through the fault of the defendant's ship, the damage done was materially increased by the master omitting to cut a lanyard when he should have done so, it was held that these acts of negligence rendered it impossible to set up as a defence the acts of the pilots (*s*). The same rule would also be applicable, in some cases, to improper acts done by one of the crew by order of the pilot, in a matter which should have been controlled by the master (*t*).

Foreign ves-
sels.

It was held before the passing of the Merchant Shipping Act, 1854, upon the general principle of international law which requires that a person suing in the Courts of any country must take his remedy as the law of that country allows it to him, that if a foreign vessel was injured by an English ship within the limits of the then Pilot Act, the latter, if she was in charge of a licensed pilot taken on board in pursuance of a statute, was protected to the same extent as she would have been against the claim of another English vessel (*u*). The language of sect. 388 of the Merchant Shipping Act, 1854, which now limits the responsibility of shipowners in cases of injury caused by the acts of a pilot compulsorily in charge of the ship is very wide; and as this section uses the words "any ship," and as by sect. 330 this portion of the statute is not confined to any particular class of ships, the existing statutory protection has been held to extend

(*s*) *The Massachusetts*, 1 W. Rob. 371. As to the extent of the pilot's control, see *supra*, pp. 249, 250. See also *The City of Cambridge*, L. R., 5 P. C. 461; *The Princeton*, 3 P. D. 90. See also *The Borussia*, Swa. 94, and *The Ocean Wave*, L. R., 3 P. C. 205.

(*t*) See *Bowcherv. Noidstrom*, 1 Taunt. 568. The 33rd section of the M. S. Act, 1862, now repealed, imposed a duty upon the "person in charge" of a ship which had come into collision with another ship to render assistance to such other ship, and enacted that in case of default to render assistance, the collision should, in the absence of proof to the contrary, be deemed to have been caused by the wrongful act of such person. In a case where, whilst this section was in force, a collision occurred between two ships one of which was in charge of a pilot by compulsion of law, it was held that the pilot was not a person in charge of the ship within the meaning of the section.

The Queen, L. R., 1 A. & E. 354. In the same case the court observed that the neglect of the master to render assistance within the section would not render the owners liable for the consequences of the collision if it had been caused solely by the negligence of a qualified pilot employed by compulsion of law. See and compare the provisions of the M. S. Act, 1873, s. 16, which is the enactment now in force.

(*u*) *The Vernon*, 1 W. Rob. 316. In the judgment of Dr. Lushington in *The Wild Ranger*, Lush. 553, the authorities with reference to the effect upon foreign ships of English statutory provisions limiting the responsibility of shipowners in cases of collision generally, and in cases of compulsory pilotage, are collected and commented on. We have already seen (*ante*, p. 80) that the protection given by the M. S. Act, 1862, to shipowners, is applicable by the terms of that act to foreign ships. See also *ante*, p. 260.

to all vessels, as well foreign as English, within the districts in which pilotage is compulsory (x).

It is provided by the 74th section of the General Pier and Harbour Act, 1847, that the owner of every vessel shall be answerable to the undertakers of the harbours and piers within the act for any damage done by such vessel or by any person employed about the same to the harbour, dock, pier or the quays or works connected therewith (y). The section, however, contains a proviso that these provisions shall not extend to impose any liability on the owner of any vessel where such vessels shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner is bound by law to employ and put his vessel in charge of. 10 Vict. c. 27,
s. 74.

(x) See *The Annapolis*, Lush. 295, and *The Princeton*, 3 P. D. 90, where both the vessels which came into collision were foreign vessels.

(y) See *post*, Ch. VIII., COLLISION, and *Adamsen v. The River Wear Commissioners*, 3 App. Ca. 743.

CHAPTER VI.

CONTRACT OF AFFREIGHTMENT AND ITS INCIDENTS.

PART I.

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THE contract of affreightment is usually embodied either in a charter-party, or in a bill of lading, but in many cases there is both a charter-party and a bill of lading.

The most important terms of this contract where its object is the carriage of goods in a merchant ship are those which regulate, on the one hand, the conveyance of the goods by the shipowner, and, on the other, the payment of the freight, which is the usual consideration for the shipowner's share of the undertaking. The contract by charter-party differs in many important respects from that by bill of lading; but as the rules which regulate the payment of freight under both of these contracts are substantially the same, it would be inconvenient to divide this portion of the subject into two distinct parts.

It is therefore proposed to consider, 1, *the contract by charter-party, the general rules by which it is governed, and the remedies for its enforcement*; 2, *the contract for the carriage of goods shipped under a bill of lading, and the ordinary rights and liabilities resulting from it*; and 3, *the right to freight generally, both under charter-parties and under contracts by bill of lading, and the important incidents connected directly with this right; including the remedies for recovery of freight, and the shipowner's lien in respect of it.*

The second part of this Chapter will then be devoted to the consideration of the subjects of *Demurrage, Stoppage in transitu, and General average.*

First, *as to the contract by charter-party.*

The charter-party (*carta partita*) is an agreement by which a shipowner agrees to place an entire ship, or a part of it, at the disposal of a merchant for the conveyance of goods, binding the shipowner to transport them to a particular place for a sum of money which the merchant undertakes to pay as freight for their carriage (a).

CHARTER-PARTY.

(a) See Pothier, *Contrat de Louage Maritime*, Pt. 1. Charter-parties are usually effected by the agency of brokers who are employed by the shipowner and paid by a commission. See *The Nuova Raffaelina*, L. R., 3 A. & E. 483; *Cross v. Pagliano*, L. R., 6 Ex. 9. See also *Burnett v. Bouch*, 9 C. & P. 620; *Cunard v. Van Oppen*, 1 F. & F. 716; *Allan v. Sundius*, 1 H. & C. 123; *Gibson v. Crick*, *ib.* 142. A charter-party seldom amounts to an actual demise of the ship. See *Fenton v. The Dublin Steam*

Packet Company, 8 A. & E. 835; *Sandsman v. Scurr*, L. R., 2 Q. B. 86; *The Scout*, L. R., 3 A. & E. 512; *The Omoa Coal and Iron Company v. Huntley*, 2 C. P. D. 466; *Steel v. Lister*, 3 C. P. D. 121. See, however, *Meikleroid v. West*, 1 Q. B. D. 428; and see *post*, p. 391. An informal agreement in the nature of a charter-party acted upon by the parties may be treated as equivalent to a charter-party; *Lidgett v. Williams*, 4 Hare, 462.

Nature of contract.

Charter-parties may be, but now usually are not, under seal. They embody the terms upon which the shipowner lends the use of the ship, and contain stipulations as to the rate of remuneration, the nature of the voyage, and the time and mode of employing the vessel.

Stamps.

Every charter-party, or agreement, or contract for the charter of any ship, and every memorandum, letter or other writing between the captain, master or owner of any ship and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board any ship, must be stamped with a six-penny stamp (b). The duty may be denoted by an adhesive stamp, which must be cancelled by the person by whom the instrument is last executed or by whose execution it is completed as a binding contract. Where a charter-party is first executed out of the United Kingdom any party thereto may, within ten days after it has been first received, and before it has been executed by any person in the United Kingdom, affix an adhesive stamp denoting the duty, and at the same time cancel (c) such stamp, and the instrument shall be deemed duly stamped. A charter-party not duly stamped may be stamped with an impressed stamp within seven days after the first execution thereof on payment of the duty and a penalty of 4s. 6d.; after seven days and within one month, on payment of the duty and a penalty of 10l. (d).

Example of form of charter-party.

The following form of charter-party will show many of the stipulations in ordinary use:—

It is this day mutually agreed between Messrs. [A. B.], agents for owners of the good ship or vessel called [*The James Scott*], A 1, 12, and newly coppered, of &c., of the burthen of 340 tons register measurement or thereabouts, whereof [C. D.] is master, now in [*Liverpool*], and Messrs. [E. F., of *Liverpool*, merchants,] that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall with all convenient speed load in [*Prince's*

(b) 33 & 34 Vict. c. 97, Schedule. A guarantee for the performance of a charter-party does not require to be stamped; *Rein v. Lane*, L. R., 2 Q. B. 144.

(c) He should cancel the stamp by writing his name or initials, or the

name or initials of his firm, on or across the stamp, together with the true date of his so writing; 33 & 34 Vict. c. 97, s. 24.

(d) 33 & 34 Vict. c. 97, ss. 66, 67, 68.

or *Salt House Dock*] a full and complete cargo of lawful merchandize, not exceeding 400 tons in weight, and therewith proceed to [*Hong Kong or Shanghai*], as ordered before sailing, or so near thereunto as she may safely get, and there deliver the same agreeably to bills of lading; after which she shall load there, or, if required, proceed to one other safe port in [*China*], and there load in the usual and customary manner from the agents of the said charterers a full and complete cargo of tea or other lawful merchandize, the cargoes being brought to and taken from alongside the vessel at charterers' risk and expense (e): which the said merchants bind themselves to ship,—not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to [*Liverpool or London*], as ordered on signing bills of lading abroad, or so near thereunto as she may safely get (f), and there deliver the same in the usual and customary manner to the said charterers or their assigns, they paying freight for the same at the rate of [7l. 10s. sterling per ton of fifty cubic feet] for tea delivered, for the round out and home; a deduction of [5s. per ton] to be made if ship be discharged and loaded at [*Hong Kong*]: other goods, if shipped, to pay in customary proportion; in consideration whereof the outward cargo to be carried freight free; payment whereof to become due and be made as follows:—[800l. on sailing, by charterer's acceptance at three months' date, what money the master may require for the ordinary disbursements of the vessel at her port of discharge and loading abroad, free of interest, paying two and a half per cent. commission, subject to insurance, at the current rate of exchange, and the balance on the unloading and right delivery of the cargo, by good and approved bills on London at two months' date, or cash equal thereto.] Ship is to have liberty to put on board eighty tons of kentledge copper drop or other dead weights, and

(e) In the place of this clause the following is sometimes made use of:—“Cargo to be brought to and taken from alongside free of expense and risk to the ship.” See *Wright v. New Zealand Shipping Company*, 4 Ex. D. 165.

(f) See as to the meaning of this

clause, *Parker v. Winlow*, 7 E. & B. 942; *Bastifell v. Lloyd*, 1 H. & C. 388; *Nelson v. Dahl*, 12 Ch. D. 568; *Capper v. Wallace*, 5 Q. B. D. 163, and the cases there cited. See also *Hayton v. Irwin*, 5 C. P. D. 130. See also *post*, p. 316.

to retain it on board during the voyage. Thirty running days (Sundays excepted) are to be allowed the said merchant, if the ship is not sooner despatched, for loading in [*Liverpool*], and forty-five like days for all purposes abroad, and ten days on demurrage over and above the said laying days and time herein stated [*at 10*l.* sterling per day*], paying day by day as the same shall become due (*g*). The time occupied in changing ports not to count as laying days. Should it be necessary for the vessel to take in dunnage the same to be provided by the owners. The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charter-party (*h*); and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due to the ship under this charter-party. *The act of God, the Queen's enemies, fire, and all other damages and accidents of the seas, rivers and navigations, of what nature and kind soever, throughout the voyage being excepted.*

The vessel to be consigned to the charterer's agents abroad free of commission. On the return of the ship to [*Liverpool*] she shall be addressed to [*G. H. & Co.*] brokers, or to their agents at any port of discharge. Penalty for non-performance of this agreement the estimated amount of freight (*i*).

Construction
of contract.

Charter-parties are construed liberally and reasonably, so as to carry out the intention of the parties as apparent on the instrument (*k*). It is often, however, difficult to apply this rule in

(*g*) A clause to the following effect is sometimes now inserted: "The cargo is to be discharged with all despatch according to the custom of the port." See *Postlethwaite v. Freeland*, 4 Ex. D. 155, and in Dom. Proc. 1880. It is sometimes provided that demurrage shall not be payable where delay in loading or discharging has been occasioned by circumstances beyond the control of the merchants, and in some cases the charter stipulates that despatch money at so much per hour shall be paid on any time saved in loading or discharging. See *Laing v. Hollway*, 3 Q. B. D. 437.

(*h*) See as to the construction of this clause, *Shand v. Sanderson*, 4 H. & N. 381; *Kern v. Deslandes*, 10 C. B., N. S. 205; *Pearson v. Goschen*, 17 C. B., N. S. 352, and *post*, p. 319.

(*i*) See *Gilkison v. Middleton*, 2 C. B., N. S. 134, and *post*, p. 402.

(*k*) *Oskey v. Hicks*, Cro. Jac. 263; *Marshall v. De la Torr*, 1 Esp. 368. See also the judgment of Lord Mansfield in *Hall v. Cazenove*, 4 East, 477, *Soames v. Lonergan*, 2 B. & C. 564, the judgment of Maule, J., in *Crozier v. Smith*, 1 M. & Gr. 415, *Browne v. Burton*, 17 L. J., Q. B. 49, the judgment of Byles, J., in *Valente v. Gibbs*, 6 C. B.,

consequence of the short and ambiguous terms in which these contracts are not uncommonly expressed. If the charter-party is under seal, the parties, as in the case of other deeds, are not estopped from showing that it was executed on a day different from the day of its date. It will also, in this case, like any other deed, speak from its delivery or execution, and not from its date; and words indicating time by relation will be construed to relate to the delivery or execution, and not to the date, unless it be referred to in terms; and even then, the same rule of construction will be applied if the date is an impossible one (*m*).

It is for the Court to construe all written contracts, but if particular words have obtained by mercantile or other usage a peculiar meaning, it is for the jury to say what the meaning of these expressions is, and then for the Court to decide on the meaning of the contract (*n*).

In charter-parties, as in other mercantile contracts, the expression "a month" is construed to mean a calendar month (*o*).

It is important to recollect, that although mercantile contracts are construed liberally and reasonably, their express terms cannot be extended by implication. Therefore, where a contract

N. S. 286, and *Dimech v. Corlett*, 12 Moo. P. C. C. 199. It is important to bear in mind, that although in the earlier cases the Courts of law not unfrequently rejected, or explained away harsh and oppressive stipulations contained in agreements, thus, in effect, making new contracts for the parties, the rule acted upon at present is to give to clear and unambiguous stipulations their obvious meaning, without reference to the possible hardship of the consequences. This rule, which is founded in good sense, and tends to make persons careful at the time when they are entering into contracts, is thus referred to in a recent judgment of the Court of Queen's Bench. "We are clear," said that Court in *Stadhard v. Lee*, 3 B. & S. 364, "that where from the whole tenor of the agreement it appears that however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon and the other to submit to it, a Court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. It frequently happens in the competition which notoriously exists in the various departments of

business, that persons anxious to obtain contracts submit to terms which when they come to be enforced appear harsh and oppressive. From the stringency of such terms, escape is often sought by endeavouring to read the agreement otherwise than according to its plain meaning, but the duty of a Court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement, and though where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not."

(*m*) *Hall v. Cazenove*, 4 East, 477; *Steele v. Mart*, 4 B. & C. 272; *Stiles v. Wardle*, *id* 908.

(*n*) *Smith v. Bland*, Ry. & M. 260; *Hutchison v. Bowker*, 5 M. & W. 535; *Smith v. Thompson*, 8 C. B. 44. See *Alexander v. Vanderzee*, L. R., 7 C. P. 530; *Ashforth v. Redford*, L. R., 9 C. P. 20; *Shand v. Bowes*, 1 Q. B. D. 470, 2 App. Ca. 455.

(*o*) *Jolly v. Young*, 1 Esp. 186; see also *Simpson v. Margitson*, 11 Q. B. 23.

for the sale of a cargo of Indian corn which had been shipped abroad contained an express warranty that it had been shipped "in a good and merchantable condition," it was held to be a misdirection to leave to the jury the question whether, at the time of the shipment, it was in a good and merchantable condition for a foreign voyage (*p*).

Usage admissible to explain contract.

Charter-parties may, like other mercantile contracts, be explained but not contradicted, by evidence of the usage of the particular trade to which the contract relates (*q*).

Measurement and stowage of cargo.

Thus, where the contract was to pay so much freight for cotton, to be calculated at a certain number of feet per ton, evidence was admitted to show that there was an usage in the trade to pay according to the measurement taken at the shipping port before the goods were loaded (*r*). So, evidence of this kind is admissible to show that a particular mode of stowing the cargo is proper in a certain trade (*s*). In a case where the charter-party provided that "a full and complete cargo of sugar and molasses" should be laden on board the ship at Trinidad, it was held that evidence was admissible to show that a custom existed at that place to load sugar and molasses in puncheons, and consequently, that a cargo loaded in this way was a sufficient compliance with the contract, although in this mode of packing there was necessarily some diminution of the cargo by reason of broken stowage. In the judgment in this case, the principle laid down in the earlier decisions, namely, that the evidence in order to be admissible must explain the contract, and not contradict or control it, was clearly recognized (*t*).

Full and complete cargo.

It must however be recollected, that the character and description of evidence admissible in these cases is the fact of a general usage and practice prevailing in the particular trade or business,

(*p*) *Dickson v. Zizinia*, 10 C. B. 602.

(*q*) See *Palmer v. Blackburn*, 1 Bing. 61, which was a case of a policy of insurance; *Magee v. Atkinson*, 2 M. & W. 446; and *Spartali v. Benecke*, 10 C. B. 212. In *Field v. Lelean*, 6 H. & N. 617, doubts were expressed in the Exchequer Chamber as to the correctness of the decision in *Spartali v. Benecke*, although the principle upon which that case was intended to be decided was recognized. See also the rules laid down in the judgments in *Mallen v. May*, 13 M. & W. 517, and *Cockburn v. Alexander*, 6 C. B. 791; and *post*,

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(*r*) *Bottomley v. Forbes*, 5 B. N. C. 121; see also *Benson v. Schneider*, 7 Taunt. 271; *Haynes v. Holliday*, 7 Bing. 587; *The Russian Steam Navigation Company v. Silva*, 13 C. B., N. S. 610; *Buckle v. Knoop*, L. R., 2 Ex. 125, 333.

(*s*) *Gould v. Oliver*, 2 M. & Gr. 208; see *Petrocochino v. Bott*, L. R., 9 C. P. 355. See *post*, p. 313, n. (*v*).

(*t*) *Cuthbert v. Cumming*, 10 Exch. 809. This judgment was affirmed in the Exchequer Chamber, 11 Exch. 405.

not the judgment and opinion of the witnesses (u). Where a question arose as to the meaning of the words, "in turn to deliver" at the port of Algiers, it was held that the testimony of three or four witnesses, speaking to a course of business that had grown up within only about five years, and with reference to charter-parties differing in language from the charter-party in question, was not sufficient to establish such a general usage as to enable the Court to construe these words in a particular way (v).

Turn to deliver.

Where it was required by a charter-party that a ship should proceed to Newcastle and be ready to take on board a cargo, consisting partly of coals and partly of coke, "in regular turns of loading." It appeared that at Newcastle the loading of coal was by act of Parliament regulated by "turns," but that there was no statutory regulation as to the loading of coke. An action having been brought upon the charter-party in the County Court for delay in loading the coke, it was held by the Court of Common Pleas that the meaning of the contract was that the coal should be loaded according to the provisions of the statute, and that evidence ought to have been admitted to show that there was a practice or usage at Newcastle to load coke in a similar manner (x).

Regular turns of loading.

In an action (y) by a shipowner against the charterer for demur-

(u) *Cunningham v. Fonblanque*, 6 C. & P. 44; *Lewis v. Marshall*, 7 M. & Gr. 729.

(v) *Robertson v. Jackson*, 2 C. B. 413. See as to the meaning of the expression "loading in turn," *Taylor v. Clay*, 9 Q. B. 713; and *Lawson v. Burness*, 1 H. & C. 396. See as to the meaning of "load in the usual and customary manner," *Tapscott v. Balfour*, L. R., 8 C. P. 46; and as to the meaning of "to be loaded with the usual despatch of the port," *Ashcroft v. The Crow Company*, L. R., 9 Q. B. 540. And see generally as to stipulations respecting loading cargo, *post*, p. 312. As to the meaning of a clause in a charter-party that cargo should be "discharged with all despatch according to the custom of the port," see *Postlethwaite v. Freeland*, 4 Ex. D. 156, and Dom. Proc. 1880.

(x) *Leidmann v. Schultz*, 14 C. B. 38. But in a subsequent case where it was agreed by the charter-party that the ship should "load with all possible despatch, in the customary manner, a full and complete cargo of coke, to be loaded in regular turn;" the Judge at the trial held that evidence was not

admissible to show that, according to a custom at the port of loading under a contract so framed, the shipowner was bound (provided reasonable despatch was used) to wait his turn, according to a list kept by a coke manufacturer who was not named in the contract, but whose name was mentioned at the time when it was entered into, on the ground that such evidence would be inconsistent with the terms of the charter-party. The Court, although it granted a new trial, hesitated to declare that the Judge was wrong in rejecting the evidence; *Hudson v. Clementson*, 18 C. B. 212. Where a charter-party provided that a ship should proceed to a particular port, and there load a full cargo of coals in the customary manner, no time being mentioned, it was held that this meant a loading according to the usage of the port, and within a reasonable time, without reference to unforeseen casualties; *Adams v. The Royal Mail Steam Packet Company*, 5 C. B., N. S. 492. But see *Harris v. Dreesman*, 23 L. J., Ex. 210.

(y) *Steam Company Norden v. Dempsey*, 1 C. P. D. 654.

Commence-
ment of
demurrage
days.

rage, it appeared that the cargo consisted of railway sleepers loaded at Riga, under a charter-party made there, by which it was agreed that the ship should carry a cargo of timber to Liverpool. By the charter-party it was provided, that the cargo should be loaded and discharged in ten days, and that for every day beyond demurrage should be paid. It was held that evidence was admissible on behalf of the defendant, notwithstanding that the plaintiff was a foreigner, to establish a custom at the port of Liverpool, that in the case of timber ships the lay days commenced only from the mooring of the vessel at the quay where by the regulations she was allowed to discharge.

Discount.

In one case, goods were shipped at New Orleans, and by the terms of the bill of lading they were deliverable at Liverpool to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with five per cent. primage and average accustomed." It was admitted, that by a custom prevailing at Liverpool in the trade in question three months' interest or discount was deducted from freights payable under bills of lading on goods coming from New Orleans, but it was contended by the shipowner that he was entitled to the full freight, the custom being inconsistent with the written contract. It was, however, held by the Court of Queen's Bench, that the custom was not repugnant to the written contract, but might well be annexed to the terms of the bill of lading (a).

As near as
she can safely
get.

In a recent case, where by a charter-party a vessel was to deliver goods at one of certain ports, "or as near thereto as she can safely get," and she was ordered to Hamburg, and the draught of the vessel with the cargo on board was too great to allow her to get up the river to Hamburg, and a portion of

(a) *Browne v. Byrne*, 3 E. & B. 702. It may be questioned whether, consistently with the principles sanctioned by the decisions on this subject, the evidence was not in this case inadmissible. See the observations on this case in *Cuthbert v. Cumming*, 10 Exch. 815; and *Phillips v. Briard*, 1 H. & N. 26. See also *Hall v. Jansen*, 4 E. & B. 500; and *Falkner v. Earle*, 3 B. & S. 360. In *Pust v. Dowie*, 33 L. J., Q. B. N. S. 173, 34 L. J., Q. B. 127, it was stipulated by charter-party that a ship should proceed from Liverpool to Sydney with cargo such as charterer should direct, and that a specified lump sum should be paid by the charterer for the

use of the vessel on condition of her not taking less than 1,000 tons of weight and measurement; it was proved that a cargo of weight and measurement was usually one third weight goods and two thirds measurement goods, but that the ordinary proportions of weight and measurement cargo for the Sydney market were two thirds weight and one third measurement. It was held that the words in the charter-party were to be considered as introduced as a test of the general capacity of the ship, and with reference to ordinary goods, and were not to be construed as having reference to a cargo for the Sydney market.

her cargo was discharged at Stade, which was as near Hamburg as the vessel with her full cargo could safely get, the defendant pleaded that by the custom of the port of Hamburg he was not bound to take delivery elsewhere than at Hamburg. This defence was held bad, on the ground that such a custom was inconsistent with the written contract (b).

Where a declaration stated that a charter-party had been entered into between the plaintiffs as charterers, and the defendant as the owner of a ship, under which the ship had carried a cargo from London to Hong Kong, consigned to the agents of the plaintiffs at Hong Kong free of commission on the charter, and then proceeded to allege, that under such a charter the agents of the plaintiffs at Hong Kong were, by the custom of merchants in London, entitled to procure a charter or cargo for the ship for any voyage from Hong Kong, being paid thereon a broker's commission on any freight payable under such charter, unless this right was excluded by express contract, it was held that the declaration was bad, since the custom did not explain the charter, but added a new term to it (c).

New term cannot be annexed by custom.

In a case where goods had been purchased by a broker for an undisclosed principal, but a note was signed at the time of the purchase representing that the goods so purchased were sold by the broker to his principal (not however naming him) for the persons who acted as the brokers of the sellers, it was held that evidence was admissible to prove an alleged custom or usage in the particular trade, that when a broker purchased without disclosing his principal, he was himself liable as purchaser (d). So, where the defendants, acting as agents for an undisclosed principal, chartered a ship and signed the charter as "agents to merchants," they were held bound by the charter-party, upon proof of a trade usage in such cases, that if the principal's name is not disclosed within a reasonable time after the signing of the charter-party, the agent shall be personally liable (e). But it has been recently decided by the House of Lords, that where a person instructs a broker to buy for him goods in a particular market, a usage of the market of a peculiar character, converting

Usage may render broker liable as principal.

(b) *Hayton v. Irwin*, 5 C. P. D. 130. As to the meaning of these words generally, see *post*, p. 320, n. (f).

(c) *Phillipps v. Briard*, 1 H. & N. 21.

(d) *Humfrey v. Dale*, 7 E. & B. 266. Affirmed *Cam. Scacc.*, Martin, B., and

Willes, J., *dissentientibus*, 1 E., B. & E. 1004, and see *Fleet v. Murton*, L. R., 7 Q. B. 126.

(e) *Hutchinson v. Tatham*, L. R., 8 C. P. 482. See *Hough v. Manzanos*, 4 Ex. D. 104.

the broker employed to buy into a principal selling for himself, of which the person who has employed the broker is ignorant, is not binding upon him (e).

Words of
description.

Quantity of
cargo.

Capacity of
ship.

It sometimes happens that words are used in a charter-party which are mere words of description, and do not form any part of the contract. Thus, when by charter-party it was agreed that a ship should proceed alongside a hulk at a foreign port and take on board therefrom "the cargo put on board thereof and forming the cargo brought by *The Oriente*, being 470 tons of guano more or less," and deliver the same in the United Kingdom, freight to be paid at a certain rate per ton, it was held that the words "being 470 tons of guano" did not form part of the contract, but amounted to a mere representation, and that, although the cargo turned out to be only 344 tons, yet as the representation was made without fraud, the shipowner could maintain no action against the shipper (f). Where a merchant agreed by charter-party to load a full cargo, the ship being within his reach for the purpose of examination, and the burthen mentioned in the description of the ship at the commencement of the charter-party was "261 tons or thereabouts," which was, in fact, considerably below the real tonnage, it was held that he was not discharged by loading the number of tons by which the burthen had been described (g).

But, as a general rule, words used in a charter-party, if not qualified by the context, must be regarded as forming part of the contract, and the parties to the charter-party must be understood as stipulating that the description or representations contained in the charter-party are correct. Where, in a charter-party

(e) *Robinson v. Mollett*, L. R., 7 H. L. 802, and see *Sweeting v. Pearce*, 9 C. B., N. S. 534.

(f) In *Gibbs v. Grey*, 2 H. & N. 22; *Barker v. Windle*, 6 E. & B. 675, the charter-party described a ship as "of the measurement of 180 to 200 tons or thereabouts," the Court was of opinion that this statement did not amount to a warranty as to the tonnage, but was a matter of description only, and consequently that the charterer, who had contracted to put on board a complete cargo, could not refuse to load on discovering that the tonnage, in fact, slightly exceeded 257 tons. In that case Willes, J., said, I think there was no warranty of the tonnage; the state-

ment in the charter-party was nothing more than a representation of the belief of the owners upon that point.

(g) *Hunter v. Fry*, 2 B. & A. 421; but see *Morris v. Levison*, L. R., 1 C. P. D. 155, and see *post*, 313; see also *Molloy*, B. 2, c. 4, s. 8. See as to the meaning in contracts for the sale of goods of the expressions "say from 1000 to 1230 gallons," and "say not less than 100 packs," *Gwillim v. Daniell*, 2 C. M. & R. 61, and *Leeming v. Snaith*, 16 Q. B. 275. As to the meaning of the word "about," when prefixed to a quantity, see *Cross v. Elgin*, 2 B. & Ad. 106; *Bourne v. Seymour*, 16 C. B. 337; *Moore v. Campbell*, 10 Exch. 323.

made at New York between British subjects, a ship was described as the A 1 Br. brig *Hannah Eastee* of Liverpool, it was held that this was an undertaking that the ship was then classed A 1 at Lloyd's (h). Where a charter-party contained the words "expected to be at Alexandria about 15th December," it was held that these words were not mere words of description, but were in the nature of a warranty that the ship, at the time of the making of the charter-party, was in such a part of the world that she might reasonably be expected to be at Alexandria on the day named (i). Where goods were shipped under a bill of lading which contained the words, shipped on board "the steamship" H., with liberty to tranship the goods into any "other steamer," it was held that the shipper of the goods was entitled to have them carried by a vessel, the principal motive of which during the voyage should be steam. The same rule would hold good with respect to similar words in a charter-party (j).

Class, position and kind of ship.

It is often difficult in construing charter-parties to ascertain whether particular stipulations amount to conditions precedent. This is to be determined by seeking for the *intention of the parties as apparent on the instrument, and from the surrounding circumstances*, and by applying the ordinary rules of construction to each particular case. It does not depend on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract (k). Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it of a portion only of the benefit of his contract, will be construed not to be a condition precedent (l). It must, how-

CONDITIONS PRECEDENT.

(h) *Routh v. Macmillan*, 33 L. J., Exch. 38. Where a ship is described in the charter-party as A 1, this is not a warranty that she shall continue so; *Hurst v. Osborne*, 18 C. B. 144; *French v. Newgass*, 3 C. P. D. 163.

(i) *Corking v. Massey*, L. R., 8 C. P. 395.

(j) *Fraser v. Telegraph Construction Company*, L. R., 7 Q. B. 570. See also *The Parana*, 1 P. D. 452; 2 P. D. 118.

(k) "The law will rather invert the words than pervert the sense," Bacon's Law Tracts, 236. Case of Revocation of Uses. See also the judgment of the Privy Council in *Dimech v. Corlett*, 12

Moo. P. C. C. 199, where it is said, "It is important not to give to mercantile instruments an unnecessarily strict construction, but such a one as, with reference to the context, and the object of the contract, will best effectuate the obvious and expressed intent of the parties."

(l) *Boone v. Eyre*, 1 H. Bl. 273, n. (a); *Shubrick v. Salmond*, 3 Burr. 1637; *Ritchie v. Atkinson*, 10 East, 295; *Puller v. Staniforth*, 11 East, 232; *Storer v. Gordon*, 3 M. & S. 308; *Fothergill v. Walton*, 8 Taunt. 576; *Shadforth v. Higgin*, 3 Camp. 385, and note, p. 387; *Defell v. Brockelbank*, 4 Price, 36; S. C.

ever, be recollected that this rule, although a very useful one, is only a rule of *construction*, a means of discovering the intention of the parties, to be applied where the words will bear either sense. For it is clear that the Courts will not make contracts for the parties, and that if they use language which distinctly shows that they intend such a stipulation to be a condition precedent, it will be so construed (*m*). Constructions, however, leading to absurd and unreasonable results will be avoided, if this can be done without violence to the terms used, because where the intention is not clearly expressed the parties will not be presumed to have meant to make an absurd or unreasonable contract (*n*).

Stipulation to
sail before a
named date.

The following cases will show the application of these rules. Where a memorandum of charter contained the words "the vessel to sail from England on or before the 4th of February next;" it was held that this stipulation formed a condition precedent, as the whole success of a mercantile adventure depends ordinarily on the commencement of the voyage by a given time (*o*). So, where the charter-party provided that the ship should sail from Amsterdam for Liverpool "on or before the 15th March next," it was held that the sailing of the ship on or before that day was a condition precedent to the obligation of the charter to load the vessel at Liverpool, although the sailing of the ship was prevented by one of the perils excepted in the charter-party, and the ordinary exception of perils of the seas &c. contained in the charter was followed by the words "through-

3 Bligh, 561; *Glaholm v. Hays*, 2 M. & Gr. 257; see also the notes to *Pordage v. Cole*, 1 Wms. Saund. 319 l; *Dimech v. Corlett*, 12 Moo. P. C. C. 199; *Roberts v. Brett*, 6 C. B., N. S. 611; 11 H. L. C. 337; 34 L. J., C. P. 241; *Hoare v. Rennie*, 5 H. & N. 19; *Seeger v. Duthie*, 8 C. B., N. S. 45; *The London Gas Light Company v. The Chelsea Vestry*, *ib.* 215, and *Behn v. Burness*, 1 B. & S. 877; *S. C.*, in Cam. Scacc., 32 L. J., Q. B. 204; *Carter v. Scargill*, L. R., 10 Q. B. 564.

(*m*) *Bright v. Cooper*, 1 Brownl. 21; *Stavers v. Curling*, 3 Bing. N. C. 368. "Parties may think some matter, apparently of very little importance, essential, and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent it will be one; or they may think that the performance of

some matter, apparently of essential importance, and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages; and if they sufficiently expressed such an intention it will not be a condition precedent." *Per Blackburn, J.*, *Bellini v. Gye*, 1 Q. B. D. 186.

(*n*) See the judgment of Lord Ellenborough in *Hall v. Cazenove*, 4 East, 477; *Bornmann v. Tooke*, 1 Camp. 377; *Puller v. Staniforth*, 11 East, 232; *Thompson v. Inglis*, 3 Camp. 428; and *Cranston v. Marshall*, 5 Ex. 395; *Wagh v. Morris*, L. R., 8 Q. B. 202; *Cargo ex Argos*, L. R., 5 P. C. 134.

(*o*) *Glaholm v. Hays*, 2 M. & Gr. 257. It was held to be otherwise where the charter-party had not been executed until after the day named; *Hall v. Cazenove*, 4 East, 477.

out the charter-party" (*p*). Where by a charter-party it was agreed, among other things, that the ship should load in the London Docks, and there take on board a cargo, that the captain should attend daily at a broker's office to sign bills of lading as customary, and that the ship should be ready for loading on or before the 10th of November, or that the charterers should have the option of cancelling the agreement, it was held that the stipulation as to the day on which the ship was to be ready was a condition precedent; but that it was otherwise as to the attendance of the master at the broker's office to sign bills of lading (*q*).

To be ready
on a given
day.

And a provision in a charter-party, that a ship should be ready to sail "in all May," was also held to be a condition precedent (*r*). Where a charter-party described the ship as then at sea and "having sailed three weeks ago," this was considered to be a material statement and to amount to a warranty of the fact (*s*); and in an action against the charterer for refusing to load the ship, a plea stating that time was an essential part of the contract, and that the vessel had sailed materially later, was held to afford a good defence.

Statement
that ship
had sailed.

Where a plaintiff covenanted that his ship should sail on a voyage for Cadiz with the next wind, and the defendant covenanted that if the ship went the intended voyage and returned to the Downs the plaintiff should be paid so much for the voyage, and the voyage was performed without unreasonable delay, although the ship did not sail with the next wind, it was held that the plaintiff was entitled to recover the stipulated freight (*t*).

To sail with
next wind.

(*p*) *Crookewit v. Fletcher*, 1 H. & N. 893.

(*q*) *Seeger v. Duthie*, 8 C. B., N. S. 45. As to whether, when no precise time for sailing is mentioned, the sailing in a reasonable time is a condition precedent or merely matter of cross action, see the judgment of Byles, J., in this case; also *M'Andrew v. Adams*, 1 Bing. N. C. 29, and *Tarrabochia v. Hickie*, 1 H. & N. 183.

(*r*) *Oliver v. Fielden*, 4 Exch. 135. Where a cargo of wheat was sold and described in the bought and sold note as "shipped per *Mimbella* as per bill of lading, dated September or October," it was held that the period of shipment did not amount to a condition, so as to entitle the buyer to rescind the contract on its appearing that the wheat had been shipped at another time; *Gattorno*

v. Adams, 12 C. B., N. S. 560.

(*s*) *Ollive v. Booker*, 1 Exch. 416. Some doubt was thrown upon this case by the decision of the Privy Council in *Dimech v. Corlett*, 12 Moo. P. C. C. 199, see *post*, p. 303. But it was approved of by the Exchequer Chamber in *Behn v. Burness*, 32 L. J., Q. B. 204, where all the cases are reviewed, and an attempt is made to reconcile them. See *post*, p. 306. A mere representation made at the time of the making of the charter-party as to the ship's position, and which is described as such on the pleadings, cannot, of course, be insisted upon as a warranty; *Elliot v. Von Glehn*, 13 Q. B. 632.

(*t*) *Constable v. Cloberie*, Palmer, 397; see also *Bornmann v. Tooke*, 1 Camp. 377.

Stipulations
as to convoy.

Where it was covenanted by a charter-party that the vessel should proceed with the first convoy from England for Spain or Portugal, and the master proceeded with an outward cargo to Lisbon, and brought home and delivered a return cargo to the freighter in London, it was held that the object of the contract was the performance of the voyage, that the stipulation about sailing with the first convoy was not a condition precedent, and that the freight for the voyage actually performed was recoverable (*u*). In another case, in which the merchant agreed to load at a foreign port a complete cargo, and to despatch the ship in time to join a convoy that should sail for England on the 1st of August: the ship was ready to load at the foreign port on the 14th of July, and there was time to have loaded her with a full cargo before the 22nd, when the convoy sailed. On that day only a small quantity of goods had been supplied, and the master of the ship refused to remain longer, and sailed with the convoy. Lord Ellenborough ruled at *Nisi Prius* that the covenant must receive a reasonable construction, and that the master was not bound to wait until the day mentioned, there having been sufficient time to load before the day on which the convoy actually sailed (*x*).

Seaworthiness
of ship.

Where the owner covenanted that he would make the ship tight and strong for the voyage and keep her so, and the freighter took the ship into his service and used her for some time, it was held, that he could not insist that this covenant was a condition precedent and resist the payment of freight on the ground of its not having been performed (*y*).

In a later case in the Queen's Bench, where a charter-party provided that the ship, "being tight, staunch and strong, and every way fitted for the voyage," should load a cargo at Sunderland and therewith proceed to Constantinople, and that a portion of the freight should be advanced on the ship having sailed, it was held, that the sailing of the ship in a seaworthy condition was made by the charter-party a condition precedent to the

(*u*) *Davidson v. Gwynne*, 12 East, 381.

(*x*) *Thompson v. Inglis*, 3 Camp. 428. Where the freight was to be paid on the right delivery of the cargo at a particular port, and the delivery was prevented by a hostile occupation of this port, it was held that the event on which the freight was made payable had not happened. See *Liddard v.*

Lopes, 10 East, 526, and the cases cited *post*, p. 363.

(*y*) *Havelock v. Geddes*, 10 East, 555; see also *Clipsbury v. Vertue*, 5 Q. B. 265. It will be observed that these cases proceeded, to some extent, on the ground that there had been a beneficial performance of part of the contract. See *post*, p. 307, n. (*d*).

payment of freight in advance; and consequently that to an action for a portion of the freight agreed to be advanced it was a good plea that at the commencement of the voyage the ship was not tight, staunch, &c., and that by reason thereof the ship and cargo were wholly lost (z). As we shall see hereafter, the shipowner is in all cases bound to provide a seaworthy ship. Yet the circumstance that the ship was not seaworthy at the date of the charter does not necessarily entitle the charterer to throw up the charter-party. Thus, in a case where a charter-party stipulated that a vessel then lying at Fiume, being tight, staunch and strong, and every way fitted for the voyage, should, with all convenient speed, sail from Fiume to Cardiff, and there load cargo, the vessel sailed to Cardiff, and it was found that the vessel was seaworthy when she arrived at Cardiff, although she was not seaworthy when she left Fiume, and that the object of the charter-party was not frustrated by reason of the unseaworthiness of the vessel at Fiume, it was held that the charterer was not entitled to refuse to load the vessel on the ground that the words "tight, staunch and strong" constituted a condition precedent (a).

Some of these decisions do not admit of being reconciled, and attention must now be called to two important modern cases, in the later of which the earlier authorities on this question were reviewed.

It is necessary to state the leading facts of the first of these cases in some detail. It was an appeal to the Privy Council; and it appeared that a ship had been described in a charter-party made at Malta, as "coppered A 1, of Malta, and now at

Cases in which earlier authorities are reviewed.

(z) *Thompson v. Gillespy*, 5 E. & B. 209. *Graves v. Legg*, 9 Exch. 709; *Roberts v. Brett*, 18 C. B. 561; *S. C.*, in error, 6 C. B., N. S. 611, *Sharp v. Gibbs*, 1 H. & N. 801, *Hudson v. Bilton*, 6 E. & B. 565, *Hoare v. Rennie*, 5 H. & N. 19, and *Bouillon v. Lupton*, 15 C. B., N. S. 113, are also modern cases in which questions as to conditions precedent have been discussed. The judgment of Lord Ellenborough in *Lyon v. Mells*, 5 East, 428, is consistent with the decision in *Thompson v. Gillespy*. See also *Shower v. Cudmore*, Sir T. Jones, 216.

(a) *Tarrabochia v. Hickie*, 1 H. & N. 183; "unless" it is said in the marginal note to this case "by the breach

of such stipulations the object of the voyage is wholly frustrated." Probably this means "unless the stipulation be of such a nature that the breach of it will frustrate the object of the voyage." In this case the Court was of opinion, that the sailing with convenient speed or in a reasonable time, was not a condition precedent. There is no doubt, however, that even in the absence of an express agreement as to time, it is an implied stipulation in all charters, the breach of which would form the ground of an action or counterclaim, that there shall be no unreasonable or unusual delay in the commencement of the voyage. See *M'Andrew v. Adams*, 1 Bing. N. C. 29.

anchor in this port;" and that it had been agreed by the charter that she should with all convenient speed proceed in ballast to Alexandria, and there load a cargo of grain or other lawful merchandize for the charterers. At the time of the making of the charter-party the ship was not, in fact, at anchor in the port mentioned, or indeed afloat, but was in a dry dock being coppered, and more than a month occurred before she was ready to sail. She was then detained for two days more at Malta, and afterwards sailed for and reached Alexandria, about twelve days later. About a fortnight after the making of the charter, the agent of the charterer at Alexandria (who had been advised of the making of the charter, and to whom the instrument had been sent) had ceded to a third person residing there all the interest of the charterer under the contract. This was done by an instrument of cession made without the privity of the shipowners or the master. The rates of freight had fallen at Alexandria between the date of the charter-party and the making of the cession, and afterwards fell still more. A few days before the ship left Malta, the cessionary had complained by proceedings in the chancery of one of the Consulates at Alexandria against the charterer's agent, alleging that the vessel had, contrary to the terms of the charter, not then left Malta. A few days after this, and three days before the ship left Malta, the charterer had entered a protest in the Commercial Court there against the master and shipowners, alleging that he had then just discovered that the vessel was still at Malta, and claiming for all damages that might be caused by her delayed departure. When the ship reached Alexandria, the master wrote to the charterer's agent there, applying for a cargo. The agent forwarded the letter to the charterer's cessionary, who wrote back to him in answer, that the "immense delay" had destroyed the cession. During the running of the lay days much discussion and several legal proceedings took place between the charterer's agent and the cessionary with reference to the cession, and the former stated to the master that the cessionary was the possessor of the charter-party, and was to be looked on as the agent of the charterer. During these discussions an offer was made to the master by the cessionary to provide a cargo, if the indemnity which he claimed for the delay at Malta was settled. This offer was not accepted, and no cargo was found by either the cessionary or by the char-

terer's Alexandrian agent, and after the expiration of the lay days the ship sailed from that port with a small cargo obtained from other persons. Proceedings were thereupon taken in the Courts of Malta by the shipowners against the charterer, claiming damages under the charter-party. In the result the Royal Court of Appeal at Malta recognized the cession, commented on the delay, and dismissed the claim of the shipowners. Upon appeal to the Privy Council this judgment was reversed. The Court was of opinion that no importance ought to be attached to the cession; that it was unnecessary to determine whether the completion of the coppering of the vessel was a condition precedent or not to the maintaining of an action on the charter-party, as this stipulation had reference to the time of the sailing and not to the date of the charter, and that the words, "now at anchor in this port," although they referred to the time of the execution of the charter, ought not to be construed as a condition precedent, as it would be "unreasonable to make the whole force of the instrument depend on a literal compliance with this unimportant stipulation." "If, indeed," the Court added, "by the failure in this respect of the shipowner, the object of the charter-party had been frustrated, a different conclusion might have been proper." Upon the more important question as to the effect of the stipulation that the ship was to sail "with all convenient speed," the Court observed, that the parties had not expressly stated for themselves, in the charter-party, that unless the vessel sailed by a specified day, the charter-party should be at an end, that the Courts should be slow to make such a stipulation for them, that it was to be presumed that the charterer living at Malta knew of the delay in the completion of the vessel, and of the time when she was ultimately in a condition to sail, and that, if so, it would have been easy and just for him to give notice to the shipowner that he intended to insist that the charter was no longer binding. The Court further remarked, that as the freights had fallen at Alexandria, even before the date of the cession, there was no evidence that the charterer might not have procured freight when the ship actually arrived at that port at as good a rate as that at which it might have been procured on the day when, according to his own calculations, the ship ought to have arrived, and that the object of the charter was frustrated not by any delay

such as the charterer had a right to complain of, but by the fall in the rate of freight (*b*).

It is obvious that, in this case, the Court took into consideration the whole of the circumstances affecting the claim of the shipowners, and rather decided that, looking at all the facts, the delay could not be set up in answer to the shipowner's claim, than that the stipulation in the charter-party as to the ship's position was not a condition precedent. If this be not a correct view of the decision, it is impossible to reconcile it with the later case as dealt with in the Exchequer Chamber.

Statement
that ship was
in a named
port on a
given day.

This case (*c*) was an action brought in the Court of Queen's Bench against a charterer for not loading a ship. It appeared that it had been agreed by a charter-party made in London, that the plaintiff's ship, "the Martaban," being "tight, staunch, and strong, and every way fitted for the voyage," should proceed with all possible speed to Newport, Monmouthshire, and there load a cargo of coals and proceed to Hong Kong. The plaintiff was described in the charter-party as "the owner of the good ship, called the 'Martaban,' now in the port of Amsterdam." At the time when the charter was made, the ship was distant from the port of Amsterdam about sixty-two miles, and did not reach that port until four days after the date of the charter. She then discharged her cargo with all possible despatch at Amsterdam, and proceeded at once to Newport, where the charterer refused to load a cargo. The Court of Queen's Bench was of opinion, upon these facts, that the words "now in the port of Amsterdam," did not amount to a warranty; and, consequently, that it was not a condition precedent

(*b*) *Dimech v. Corlett*, 12 Moo. P. C. C. 199.

(*c*) *Behn v. Burness*, 1 B. & S. 877; *S. C.*, in Cam. Scacc., 3 B. & S. 752; 32 L. J., Q.B. 204. The opinion formed in this case by the Court of Queen's Bench (from which Mr. Justice Wightman dissented) was intended to be founded upon *Dimech v. Corlett*, *ubi supra*; and the following observations were made in that Court by Cockburn, C. J., with reference to the unsatisfactory state of the decisions:—"I own, if this question were *res integra*, I should be much disposed to think that the best mode of construing these charters, where there is a representation as to the place of a ship, or as to the time of sailing, or analogous matter, would

be to hold, that if the fact represented turns out not to be correctly stated, and in consequence of it the charterer finds himself in a position where his speculation and enterprise may be frustrated and the contemplated advantages of them converted into disaster and loss, that should justify him in repudiating the contract. But, on the other hand, where the representation is that the ship is at a given place, or is to sail on a given day, &c., and it turns out that she was not there, or could not sail for some short time after that specified, &c., and there is no real frustration of the objects of the charterer, and little or no damage has been done to him, he should be left to his action."

to the charterer's liability that the ship should have been at that port at the time of the charter. This decision was, however, reversed in the Exchequer Chamber, where it was held that the words in question imported a warranty, and that, as the ship was elsewhere at the time of the making of the charter, the defendant was justified in saying that there had been a failure in the performance of a condition precedent, and in refusing altogether to carry out the contract (*d*).

(*d*) *Behn v. Burness*, in *Cam. Scaoc.*, *ubi supra*. In this judgment the Exchequer Chamber examined the earlier authorities and made the following observations, which have so important a bearing upon a question of frequent occurrence that they are inserted at length. "Properly speaking," said the Court, "a representation is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Although it is sometimes contained in a written instrument, it is not an integral part of the contract, and consequently the contract is not broken, although the representation proves to be untrue. . . . Although representations are not usually contained in the written instrument of contract, yet they sometimes are, but it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction, which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement was intended to be a substantive part of the contract, and not a mere representation, the often-discussed question may be raised, whether this part of the contract is a condition precedent, or only an independent agreement a breach of which will not justify a repudiation of the contract, but can only be a cause of action for compensation in damages. In the construction of charter-parties this question has often been raised with reference to stipulations that some future thing should be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail, or to be ready to receive cargo on or before a given day, has been held to be a condition—see *Glaholm v. Hays*, 2 M. & Gr. 257; *Oliver v. Fielden*, 4 Exch. 135; *Crocker v.*

Fletcher, 1 H. & N. 893; and *Seager v. Duthie*, 8 C. B., N. S. 45,—while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement—see *Turrabochia v. Hickie*, 1 H. & N. 183; *Dimesh v. Corlett*, 12 Moo. P. C. C. 199; see also *Clipham v. Vertue*, 5 Q. B. 265. But with respect to statements in a contract, descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle, as well as by authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages—see *Ellen v. Topp*, 6 Exch. 424, *Graves v. Legg*, 9 Exch. 709, adopting the observations of Williams, Serjt., on the case of *Boone v. Eyre* (1 Wms. Saund. 320 *d*); see also *Elliott v. Von Glehn*, 13 Q. B. 632. . . . In the present case, as the defendant has not received any benefit or advantage under the contract, but has wholly repudiated it, the question is simply, whether, on the true construction of the charter-party, the Court ought to infer that the statement as to the ship being at that date in the port of Amsterdam was meant to be a substantive part of the contract, or a representation collateral to it. . . . It is plain that the Court must be influenced

In the absence of express words the substance of the contract determines the character of the stipulation.

Where the parties have not clearly expressed their intention by the words of the contract, that the fulfilment of a particular

in the construction not only by the language of the instrument, but also by the circumstances under which, and the purposes for which, the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance that a statement of it in the charter-party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty. Whereas the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So, if it were shown that the charter-party was made for a purpose, such that unless the vessel began her voyage from the port of loading, with a cargo on board by a certain time, it was manifest that the object of the charter-party would in all probability be frustrated, the Court might properly be led by these circumstances to conclude that a statement as to the locality of the ship, coupled with the stipulation that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion that appears to have been, to some extent, sanctioned by high authority—see *Dimech v. Corlett*,—that a statement of this kind in a charter-party, which may be regarded as a mere representation if the object of the charter-party be still practicable, may be construed as a warranty if that object turns out to be frustrated, because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterwards occur. . . . The question on the present charter-party is confined to the statement of a definite fact, the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, when the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For in most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact for the interest of the charterer. In

the ordinary course of charters in general it would be so. The evidence for the defendant shows it to be actually so in this case. Then if the statement of the place of the ship is a substantial part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained, unless we can find in the contract itself, or the surrounding circumstances, reason for thinking that the parties did not so intend. If it was a condition, and not performed, it follows that the obligation of the charterer dependent thereon ceased at his option; and considerations either of the damage to him, or of proximity to performance on the part of the shipowner, are irrelevant." The Court, after referring again to *Glaholm v. Hays*, and *Ollive v. Booker*, proceeded as follows:—"We think these cases well decided, and that they govern the present case. We think that the decision of *Dimech v. Corlett*, does not conflict with them, because it is immersed in the specific facts there set out, so as to be a precedent only for cases of very analogous specific facts. The statement in that charter, that the ship was 'now at anchor in this port' (Malta) did not avail to release the charterer, because the ship was in the port in the dry dock, although the statement of the fact that she was at anchor in the port was definite, and indicated that she was ready for sea, while in truth she was in a dry dock being built, and was not completed for a month; yet as the defendant was at Malta, and was presumed to have known the state of the ship, and also to have known of the delay, and did not insist that the charter-party was broken, but allowed the ship to sail from Malta to Alexandria without objection, his defence on this point failed." Whatever may be thought of the attempt in this judgment to reconcile the decision with *Dimech v. Corlett*, or of the view taken in it of the conduct of the charterer in the last-mentioned case, it is clear that the reasoning upon which the judgment is founded is far more satisfactory than that which is to be found in some of the earlier cases, where the Courts have construed charter-parties rather with reference to the presumed hardship of certain interpretations, than with regard to the language used by the parties.

stipulation shall be a condition precedent, the more recent cases conclusively establish the proposition that the question whether the stipulation is in the nature of a condition precedent, depends chiefly upon whether it forms part of the substance of the contract, and whether it is of such a nature that the breach of it will frustrate the object of the contract. In one of these cases (*f*) the charter-party contained a clause that a ship which had recently been launched at an English port should, with all convenient speed on being made ready, having liberty to take an outward cargo for owner's benefit direct or on the way, proceed to Alexandria, and there load a cargo from the charterers. The ship proceeded to Alexandria, but she deviated from the direct passage there, by proceeding to Constantinople and other ports. The deviation caused a delay of a few days only, and in no sense frustrated the object of the voyage. The Court held that the deviations were not such as to justify the charterers in refusing to load the ship on her arrival at Alexandria (*g*). In a case (*h*) where a charter-party provided that the ship should load a full and complete cargo of sugar in bags, hemp in bales, and measurement goods, and specified different rates of freight for dry and wet sugar, and provided that the vessel should be a good risk for insurance before and when receiving cargo; the ship proceeded to her port of loading, and, having been surveyed, was reported to be a first-class risk. A cargo of wet sugar was provided for her by the charterer, and when the bulk of the cargo had been loaded, there was found to be such a large amount of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in the condition she then was. It became necessary to unload the cargo, and the charterer then refused to re-load it or to provide another cargo. An action was brought by the shipowner against the charterer for refusing to load according to the terms of the charter-party, and a cross action was brought by the charterer against the shipowner for neglecting

Proceed with
all convenient
speed.

Fitness to
carry stipu-
lated cargo.

(*f*) *MacAndrew v. Chapple*, L. R., 1 C. P. 643.

(*g*) Willes, J., said, p. 648. It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this Court, that a delay or deviation which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of

the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter.

(*h*) *Stanton v. Richardson*, L. R., 7 C. P. 421, 9 C. P. 391, and on appeal in Dom. Proc., 46 L. J., C. L. 78.

Delay in commencement of time charter.

to have the ship fitted for receiving the agreed cargo, and for not carrying the agreed cargo. The jury at the trial found, as a fact, that the ship was not reasonably fit to carry a cargo of wet sugar, and could not have been made fit within such a time as would not have frustrated the object of the adventure, and a verdict was entered for the charterer in both actions. The Court of Common Pleas refused to disturb the verdict, and the Court of Exchequer Chamber and the House of Lords affirmed the decision. In another case (*i*), where the plaintiff agreed to charter a ship described as then in Sunderland, bound to London, for twelve months after completion of the "present voyage," and after the completion of the voyage the ship was detained as unseaworthy by the officers of the Board of Trade, and the necessary repairs occupied two months: when the repairs were completed, the shipowner offered the vessel to the charterer, but he refused to load her: it was held by the Court of Appeal, affirming the judgment of the Queen's Bench Division, that the charterer was justified in rescinding the charter. Mellish, L. J., in delivering judgment, said (*j*):—"We are of opinion that, as in a charter for a voyage the specified voyage would be of the essence of the contract, and the charterer, if he could not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, so, in a charter for time, if the charterer cannot have a vessel for the specified time, he is not bound to take the vessel for a shorter, or a substantially different, time; and if he cannot get the vessel for the specified time, he may throw up the charter."

ENGAGEMENTS IMPLIED ON THE PART OF THE SHIP-OWNER:

There are certain terms which even if not expressed in the contract of affreightment must ordinarily be regarded as implied. Thus, in whatever way the contract to carry goods in a

(*i*) *Tully v. Howling*, 2 Q. B. D. 182.
(*j*) Brett, J., rested his judgment on the ground that on the facts the jury ought to have found that the ship was not fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure. In *Bradford v. Williams*, L. R., 7 Ex. 259, the charter-party provided for the continuous employment of a vessel on short voyages from May, 1871, to March, 1872, and stipulated that the vessel should load with G. &

Co. or F. & Co. till the end of Sept. at captain's option, after Sept. with F. & Co. In September the captain exercised his option in favour of loading from G. & Co.; but the charterers having refused to load from G. & Co. the shipowners refused to continue working under the charter. In these circumstances it was held that the breach of the charter-party, which the charterers had committed, went to the root of the contract and justified the shipowner in declining further to perform the charter-party.

ship be made, whether it be in the shape of a charter-party or any other form, the shipowner is, unless there be an agreement to the contrary, impliedly held to warrant that the ship he provides shall be seaworthy and in a condition to perform the voyage and undergo the perils of the sea and other included risks to which she must of necessity be exposed in the course of the voyage (*k*).

To provide a seaworthy ship—

As it is the duty of the shipowner to furnish a vessel fit to carry the cargo that the charterer has agreed to put on board; so, in the absence of any express provision as to time, he must be taken to stipulate that he will do so within a reasonable time, and if he delays to do so for an unreasonable time, so as to destroy, in a commercial sense, the success of the adventure, the charterer is entitled to throw up the charter (*l*). In a recent case (*m*), where a vessel was chartered to proceed with all convenient speed, dangers and accidents of navigation excepted, from Liverpool to Newport, and there load cargo, the vessel, in the course of her passage from Liverpool to Newport to fulfil the charter, was stranded; and although she was afterwards got off, the time necessary for repairing her was so long as, in the opinion of the jury, to make it unreasonable for the charterers to supply the cargo at the end of that time, and so as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers: it was held that the charterers were absolved from loading the vessel; that it was, in fact, an implied condition precedent that the vessel should arrive at the port of loading at such a time that the contemplated adventure should be possible in a business sense. The ship not arriving at that time, the contract was at an end, although, as the delay arose from an excepted peril, no action could have been maintained in respect of the delay by the charterers against the shipowner (*n*).

within a reasonable time.

(*k*) *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Steel v. The State Line Company*, 3 App. Ca. 72. This implied warranty attaches at the time when the ship sails with the cargo on board for her port of destination, and this warranty is broken if she is then unseaworthy, although she may have been seaworthy at the time of commencing to take on board her cargo; *Cohn v. Davidson*, 2 Q. B. D. 455. Further, the shipowner not only undertakes that the ship shall be fit to carry a cargo of merchandize, but where a particular

cargo has been named in the contract of affreightment he undertakes that the ship shall be fit to carry the cargo named; *Stanton v. Richardson*, L. R., 7 C. P. 421; 9 C. P. 390; 45 L. J., C. L. 78.

(*l*) See *Stanton v. Richardson*, *supra*, and *Kopitoff v. Wilson*, 1 Q. B. D. 377.

(*m*) *Jackson v. Union Marine Insurance Company*, L. R., 8 C. P. 572; 10 C. P. 125.

(*n*) See per Blackburn, J., *Poussard v. Spiers*, 1 Q. B. D., at page 414. But see *Hurst v. Osborne*, 18 C. B. 144,

To prosecute the voyage without unnecessary deviation.

Although the charter-party usually stipulates that the vessel shall proceed on the agreed voyage with all convenient speed (*o*), yet in the absence of any such express stipulation there is an implied obligation on the part of the shipowner to prosecute the voyage with all due despatch, and if any loss or damage is sustained by the charterer by reason of undue delay or deviation his remedy lies against the shipowner (*p*). But a deviation for the purpose of saving life is always justifiable on the ground that owners of ship and owners of cargo must be regarded as impliedly assenting to a departure for the purpose of carrying out the clear moral duty of assisting fellow creatures in distress (*q*).

Collateral agreement that ship should first fulfil other engagements.

Where a charter-party contained a warranty that a ship was in a position to arrive at the port of loading within a named date, in an action for a breach of the warranty it was held to be a good answer that the charter-party was made subject to a condition that the ship should first with convenient speed fulfil other engagements and then proceed to her port of loading, and that she did so (*r*).

DUTY OF MASTER ON ARRIVAL AT PORT OF LOADING.

In the absence of an express stipulation in the charter-party requiring the master to give notice of the arrival of the ship at the port of loading, no obligation is imposed upon the master to give such notice to the charterer or his agent, because the arrival of a ship at a port is matter of notoriety of which the charterers are bound to take notice; but when the readiness of the ship to load the agreed cargo depends upon the discharge of a cargo with which she was laden upon arrival in the port, or depends upon the removal of the ship into a particular dock or other matters of a like kind within the control and knowledge of the shipowner, it seems that the charterer is entitled to notice (*s*).

OBLIGATION OF FREIGHTER TO LOAD.

The usual form of charter provides that the freighter shall

where it was held that the charterer was not excused from his contract to load a full cargo of grain, by reason of the ship, owing to sea perils, arriving at the port of loading after the export season for grain was over.

(*o*) See *supra*, p. 309.

(*p*) *Davis v. Garrett*, 6 Bingham, 716; *Jones v. Holm*, L. R., 2 Ex. 335.

(*q*) *Scaramanga v. Stamp*, 4 C. P. D. 316; *S. C.* on appeal, 5 C. P. D. 295. See *The Scindia*, L. R., 1 P. C. 246; *The Sir Ralph Abercrombie*, L. R.,

1 P. C., at page 461. On the completion of the loading of the cargo, the ship should proceed on her voyage without delay; *Bornmann v. Tooke*, 1 Camp. 377. A delay by deviation is the same as a delay in starting; *McAndrew v. Chapple*, L. R., 1 C. P. 643. And see *post*, p. 318.

(*r*) *Corking v. Massey*, L. R., 8 C. P. 395; *White v. Parkin*, 12 East, 579.

(*s*) *Stanton v. Austin*, L. R., 7 C. B.; *Harman v. Mant*, 4 Camp. 161; *Fairbridge v. Page*, 1 Car. & K. 317.

load a "full and complete cargo" (t), and he is bound to do so, provided there is no default by the shipowner (u). Where a full cargo is to be shipped consisting of heavy and light goods, or of different kinds of goods at lower and higher freights, it is often material to ascertain the precise meaning of the contract; as in the latter case, the amount of freight may depend on the character of the goods laden, and in the former, the shipowner would be benefited by the shipment of heavy goods adapted to supply the place of ballast.

No general rule can be laid down which will apply to all cases; but the decision of them must depend upon the intention of the parties as apparent on the express contract, or as it is to be implied from the surrounding circumstances, or from any custom of the particular voyage capable of being annexed to the contract. Usually the shipper has the option to load what goods he thinks best, and the shipowners are bound to ballast the ship properly (v).

(t) As to the meaning of the words "a full and complete cargo, say about 1100 tons," see *Morris v. Levison*, 1 C. P. D. 155. See also *supra*, pp. 294, 298. As to the meaning of cargo in a contract for the sale of a cargo see *Borrowman v. Drayton*, 2 Ex. D. 15; *Kreuger v. Blank*, L. R., 5 Ex. 179; *Ireland v. Livingston*, L. R., 6 H. L. 395; *Gifford v. Dishington*, 9 Sess. Cases, 3rd series, 1045. Where a cargo of wheat, to be shipped, had been sold, and the contract note mentioned certain quantities as the maximum and minimum to be shipped, it was held that the purchaser was entitled to refuse to accept the shipping documents, or to pay for the cargo, as the bill of lading and shipping documents represented the cargo to consist of a greater quantity than the maximum fixed. It was also held that the purchaser was not bound to pay for the cargo, or to accept shipping documents which represented it to be within the prescribed limits, if in fact it exceeded them. *Tamvaco v. Lucas*, 1 E. & E. 581—592. See also *Tamvaco v. Lucas*, 1 B. & S. 185, 3 B. & S. 89, where a question arose on a similar contract as to the sufficiency of a policy of insurance, tendered as one of the shipping documents.

(u) In *Jones v. Holm*, L. R., 2 Ex. 335, the defendant chartered a vessel to load at a named port. The charter-party contained the usual exception of fire. After a part of the cargo had been loaded a fire on board the ship rendered it necessary to repair the ship,

and caused a delay of two months. At the end of the two months the charterer refused to load the residue of the agreed cargo. It did not appear that the delay was such as to frustrate the object of the adventure, and it was held that the charterer was liable for breach of contract in refusing to complete the loading.

(v) See the cases cited in the following notes, and *Irving v. Clegg*, 1 B. N. C. 53; *Capper v. Forster*, 3 B. N. C. 938; *Gibson v. Young*, 2 Moore, 224; *Cockburn v. Alexander*, 6 C. B. 791; *The Southampton Steam Colliery Company v. Clarke*, L. R., 4 Ex. 73; 6 Ex. 53; *Pust v. Dowie*, 5 E. & B. 20, 33, and *ante*, p. 76, note (u). Where a charter-party provided that the charterer should load a full and complete cargo of sugar or other lawful produce, freight to be paid, in certain rates on certain specified goods, and in proportional rates on other goods, if any should be shipped, except what might be shipped for broken stowage, which should pay as customary, and the charterer put on board as large a quantity of timber as the vessel could carry, but did not supply any broken stowage, for some of which there was room, it was held, that the question as to the completeness of the cargo was for the jury; but that, if it was for the Court, the charterer, having exercised his right of choice, and put on board an article with which the ship could not be fully loaded, was bound to supply broken stowage to fill up the cargo

Kind and quantity of goods, and manner of loading.

Thus, where the covenant was to provide a full cargo consisting of copper, tallow, and hides, *or other goods*, on which separate rates of freight were to be paid, it was held that it was performed by supplying as much tallow and hides as the master chose to take on board, and that the freighter was not bound to provide any copper; although it was necessary, for want of it, to retain the ballast on board (*x*). Where it was agreed by the charter-party that the ship should proceed to Baltimore and there load a full cargo of produce, and that freight should be paid at and after a certain rate per barrel of flour, meal, and naval stores, but that a higher sum per quarter of 480 lbs. was to be paid for Indian corn, or *other grain*, and that the cargo should not consist of less than 3,000 barrels of flour, meal, or naval stores, but that not less flour or meal than naval stores should be shipped, and it appeared that the shipper had put on board a large quantity of oats, but there was evidence that oats were not an usual shipment from America, and that a quarter of them weighed much less than 480 lbs., and occupied a much larger space than a quarter of Indian corn, or of wheat at that weight, it was held that the words *other grain* were confined to *other grain weighing 480 lbs. a quarter*, and did not include oats; and also that the shipowner was entitled to freight as if 3,000 barrels of flour, meal, or naval stores had been shipped, and that for the rest of the space he was to be paid as if it had been filled with Indian corn, or other grain of the average weight of 480 lbs. per quarter (*y*). And where a freighter had the option to load a ship either wholly with one kind of goods at a higher rate, or partly with such goods, and partly with others at a less freight, and it was necessary that the latter, if laden at all, should be laden first, it was held, that the freighter, by beginning to load with the goods at the higher freight, had elected to furnish an entire

space; for since the shipowner would have been bound to carry some broken stowage if the charterer had requested him to do so, there was a correlative obligation on the part of the charterer to supply some. *Cole v. Meek*, 15 C. B., N. S. 795. The shipowner may put merchandize on board as ballast if it occupy no more room. See *Towse v. Henderson*, 4 Ex. 890. Where the charterers agreed to load "a full and complete cargo of sugar in cases or other lawful merchandize with sufficient bags for stowage, the freight on other goods to be paid in ratio

proportionate to sugar in casks with sufficient bags for broken stowage agreeably to the custom of the port of loading," it was held that having put on board a cargo of cotton equal to one of sugar the charterers were justified in substituting stones as ballast for bags of sugar. *Duckett v. Satterfield*, L. R., 3 C. P. 227. As to the effect of custom on the mode of loading a "full and complete cargo" of sugar, see *Cuthbert v. Cumming*, 10 Ex. 809, *supra*, 294.

(*x*) *Moorsom v. Page*, 4 Camp. 103.

(*y*) *Warren v. Peabody*, 8 C. B. 800.

cargo of such goods, and that as he had not furnished a complete cargo, the jury were warranted in assessing the damages for the entire complement at the higher rate (s). Usually, however, where the option of selecting the articles lies with the freighter the proper mode of estimating the damages, if a full cargo is not loaded, is by an average upon the various rates of freight, calculated in the proportion of the different articles usually carried on such a voyage (a).

A contract to load a full cargo does not, in the absence of usage or express stipulation, mean that cargo shall be loaded on deck or elsewhere than in the holds of the ship (b). In a case where a charter-party had been made in the usual form, by which the shipowner was to receive and the charterer to ship a full cargo, it was held that the latter had no right to load the cabin; and that as he had done so by consent, the freight payable in respect of the portion of the cargo so loaded was not the chartered freight, but such sum as a jury might think would fairly represent the current rate of freight at the loading port at the time of the taking in of the cargo (c).

When the owners of a general ship undertake to receive goods, there is an implied undertaking on the part of the shippers that they will not knowingly deliver packages of goods of a dangerous nature, which those employed by the shipowners may not, on inspection, be reasonably expected to know to be of that nature, without giving notice (d). There is, however, no warranty on the part of the shipper that the goods are fit for shipment, and if he ships dangerous goods on board, not knowing of the character of the goods, he incurs no liability (e). The Merchant Shipping Act, 1873, imposes restrictions upon the shipping of certain goods of a dangerous character, such as *aqua fortis*, gunpowder, petroleum and such like (f).

Dangerous goods.

Questions of some difficulty not unfrequently arise where

Rights of parties when ship is unable to get to port of loading.

(z) *Benson v. Schneider*, 7 Taunt. 272.
(a) *Thomas v. Clarke*, 2 Stark. 450;
Capper v. Forster, 3 B. N. C. 938;
Cockburn v. Alexander, 6 C. B. 791;
and *Warren v. Peabody*, 8 C. B. 800. See also, as to the measure of damages for not loading pursuant to charter-party, *Smith v. M'Guire*, 3 H. & N. 554, and *Wilson v. Hicks*, 26 L. J., Ex. 42.

(b) *Neill v. Ridley*, 9 Ex. 677.

(c) *Mitcheson v. Nicol*, 7 Ex. 929.

(d) See the judgments of Lord Camp-

bell, C. J., and Mr. Justice Wightman, in *Brass v. Maitland*, 6 E. & B. 470. Mr. Justice Crompton thought that the duty of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice. See also *Hutchinson v. Guion*, 5 C. B., N. S. 149; and *Farrant v. Barnes*, 11 C. B., N. S. 553.

(e) *Acatos v. Burns*, 3 Ex. D. 282.

(f) The M. S. Act, 1873, ss. 23—27. See *supra*, p. 184.

the ship, by reason of her draught of water, is unable to enter the port of loading or to leave it fully laden.

Where a ship was to proceed to a bar-harbour, or as near thereto as she could safely get (*g*), and the merchant was to load a full cargo, and at the time of the making of the charter-party, both parties knew that if a full cargo were loaded within the bar, the vessel would not be able to recross it and get out to sea, it was held that the shipowners had complied with their undertaking by taking the ship within the bar and receiving there as much of the cargo as she could carry over the bar, and by waiting outside the bar for the remainder (*h*). In a later case a charter provided that the ship should proceed to a particular port or so near thereunto as she could safely get and should be ready to load by a given day, taking from the factors of the merchant such produce as he might find it convenient to ship, not exceeding what the ship could reasonably stow and carry. The ship so loaded was to proceed to London and deliver the cargo on being paid a lump sum for freight, and the cargo was to be taken to and from alongside at the merchant's risk. The ship proceeded to and entered the port named, which was a bar-harbour, which could not be entered or left at certain tides by vessels of a certain draught. A cargo was then placed on board by the agent of the merchant, for which the master signed bills of lading. When the vessel was thus laden she drew so much water that she grounded upon the bar, and it became necessary, therefore, to take out nearly all the goods. The master then offered to take on board so much of the cargo as would not prevent his passing the bar in safety, and then to remain outside the harbour, and, if possible, to take in there, at the merchant's risk, the remainder of the cargo. The agent of the merchant refused to assent to this, and the ship sailed with only a small quantity of goods on board. Under these circumstances, it was held the shipowners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo, for that the master, although not bound to go within the bar at all, having done so and having signed bills of lading, was bound to find his way to his destination (*i*).

(*g*) As to the effect of custom respecting the meaning of the words "as near thereto as she may safely get," see *supra*, p. 296, and see *post*, p. 320, n. (*f*).

(*h*) *Shield v. Wilkins*, 5 Ex. 304.

(*i*) *The General Steam Navigation Company v. Slipper*, 11 C. B., N. S. 493. See also *Strugnell v. Friedrichson*, 12 C. B., N. S. 452.

In another case it was held that a shipowner was not discharged from his liability to complete the voyage, and to take his ship to a port up the Danube at which it was by the charter-party agreed that a cargo should be laden, by reason of a want of water at the mouth of the river which lasted two months, even although the charter provided that the ship should proceed to the port of loading, "or as near thereunto as she might safely get," and contained the ordinary exception as to perils of the seas; and although it also appeared that it would not have been safe for the ship to lie during the latter of the two months off the mouth of the Danube (*j*).

The principle to be derived from the cases seems to be that where by the charter-party it is stipulated that a ship is to proceed to a named place either for the purpose of loading or unloading, "or so near thereto as she may safely get," and the shipowner has brought his ship near to the named place, and is prevented from getting nearer by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, without incurring such delay as would, having regard to the object of the adventure of both the shipowner and the charterer, be, as a matter of business, wholly unreasonable; the voyage must be regarded as having come to an end, and the charterer is bound to perform his share of the contract to load or to receive the cargo at the place where the ship lies (*k*).

Where the charterers contracted to load a cargo of coals on board "with usual despatch," it was held that they were bound to load the vessel with the usual despatch of persons who have a cargo ready for loading at the port, and that they were liable for a delay caused by a severe frost which rendered unnavigable the canal along which coals were to be brought (*l*).

Express provision to load with despatch.

Where the charter-party is silent as to time the law will

(*j*) *Schilizzi v. Derry*, 4 E. & B. 873. See also *Kearon v. Pearson*, 7 H. & N. 386; *Parker v. Winlow*, 7 E. & B. 942; and *Bastifell v. Lloyd*, 1 H. & C. 388.

(*k*) See the judgment of Brett, L. J., in *Nelson v. Dahl*, 12 Ch. D., at p. 593. In the case the charter-party provided that the ship should proceed "to London Surrey Commercial Docks, or so near thereto as she may safely get." The ship arrived in London, and the owners of the dock were applied to for a berth, but they refused to assign one in consequence of the crowded state of

the docks, and the shipowner's application for admission to the docks was refused. There was no prospect of the ship being able to gain admission to the dock for six weeks at least. In these circumstances the ship was moored at the nearest safe place. It was held, under the circumstances, that the obligation of the charterer to take delivery commenced as soon as the ship was moored as near as she could safely get to the docks.

(*l*) *Kearon v. Pearson*, 7 H. & N. 386.

Implied provision to load in reasonable time.

imply a contract on the part of the merchant to do acts such as the providing of cargo, the performance of which depends entirely upon himself within a reasonable time. So where the act contracted to be done is one in which both parties must concur, as, for instance, the loading or the discharge of the cargo, the contract to be implied by law in the absence of any express stipulation as to time is that each party shall use reasonable diligence in performing his part (*n*). But where there is an implied obligation that each party shall use reasonable diligence in performing his part of the contract, if owing to some unexpected event beyond the control of either party, the performance of the acts to be done by each are delayed for an unreasonable time, neither can maintain an action against the other (*o*).

STOWAGE OF CARGO.

In the absence of custom or agreement to the contrary, it is the duty of the master, on the part of the owner, to receive and properly stow on board the goods to be carried (*p*), which ordinarily are to be delivered to him alongside (*q*). This is a duty arising upon the mere receipt of the goods for the purpose of carriage (*r*).

Stevedore.

It frequently happens, however, that the charter-party provides that a stevedore shall be appointed by the charterer, and in such cases the master is not liable to the charterer for the negligence of the stevedore employed by the charterer (*s*). Where, however, a ship is put up as a general ship by the charterers, and goods are delivered to the master by a shipper who has no notice of the charter-party, the master or owners of the ship cannot rely upon the provisions of the charter-party respecting the employment of a stevedore to protect themselves against a claim by the shipper for negligent stowage (*t*).

Where a charter-party provided that "the charterers' stevedore was to be employed by the ship," it was held that these words merely gave to the charterer an option to employ a stevedore, and if he chose not to do so, that the master was

(*n*) *Ford v. Cotesworth*, L. R., 5 Q. B. 544; *Fowler v. Knoop*, 4 Q. B. D. 299.

(*o*) *Ford v. Cotesworth*, L. R., 5 Q. B. 544. See further as to delay, *ante*, p. 94, n. (*p*).

(*p*) See *Blackie v. Stenbridge*, 6 C. B., N. S. 894; *Swainston v. Garrick*, 2 L. J., Ex. 225.

(*q*) See *British Columbia Saw Mill*

Company v. Nettleship, L. R., 3 C. P., at p. 502.

(*r*) *Hayn v. Culleford*, 3 C. P. D. 416; 4 C. P. D. 182.

(*s*) As to the effect of clauses in charter-parties or bills of lading exempting the shipowner from negligent stowage, see *post*, pp. 357, 358.

(*t*) *Sandeman v. Scurr*, L. R., 2 Q. B. 86.

not relieved from his ordinary duty to load the ship (*u*). And where a charter-party contained a provision that the charterers should be at liberty to employ stevedores and labourers to assist in loading cargo, but that such stevedores and labourers, being under the control and direction of the master, the charterers were not to be responsible to the owners for damage or improper stowage, it was held that there was nothing in the charter-party to exonerate the shipowners from responsibility for negligent and improper stowage by the stevedores employed by the charterer (*x*).

The general obligation of the master with reference to signing bills of lading for goods laden on board is considered elsewhere (*y*); but it is necessary to note here that the master must act in accordance with the provisions of the charter-party. Thus, he has no authority to sign bills of lading at a freight less than the chartered freight in the absence of express provisions in the charter-party (*z*). But it not unfrequently happens that the charter-party provides that bills of lading shall be signed by the master as presented to him, at any rate of freight, without prejudice to the charter-party (*a*). In such cases the master is, of course, bound by the terms of the charter-party, and if he refuses to sign bills of lading as presented, he renders the owners liable for breach of contract (*b*). There is no duty on the charterers, in the absence of custom or express contract, to hand over to the shipowners copies of the bills of lading of the goods put on board (*c*).

It seems that a person who has shipped goods may re-demand the goods a reasonable time before the ship sails, on payment of the freight which would become due, and indemnifying the master against the consequences of any bills of lading signed for the goods (*d*).

The charter-party often contains stipulations that the cargo shall be delivered at one of several ports as ordered, or at a safe port within specified limits, and that the ship shall call at a port

Stipulations in charter-party as to bills of lading.

Right of shipper to re-demand goods.

(*u*) *The Anglo-African Company v. Lamesed, L. R.*, 1 C. P. 226.

(*x*) *Sack v. Ford*, 13 C. B., N. S. 90. See also *Roberts v. Shew*, 32 L. J., Q. B. 308.

(*y*) See *supra*, p. 136, *post*, p. 343.

(*z*) *Hyde v. Willis*, 3 Camp. 202.

(*a*) *Pearson v. Goschen*, 33 L. J., C. P.

266. As to the meaning of the words "without prejudice to the charter-

party," see *Shand v. Sanderson*, 4 H. & N., at p. 389; *Santos v. Brice*, 6 H. & N. 290; and see *supra*, p. 272.

(*b*) *Jones v. Hough*, 5 Ex. D. 115. But in ordinary cases the damages recoverable will be nominal only.

(*c*) *Dutton v. Pwoles*, 2 B. & S. 174; *S. C.*, in error, *ib.* 191.

(*d*) *Tindall v. Taylor*, 4 E. & B. 219.

**PORT OF CALL
FOR ORDERS.**

of call for orders. It is sometimes provided that the orders shall be given within a specified time after the arrival of the ship at the port of call; but, in the absence of any such stipulation, the ship is bound to wait for orders a reasonable time only, and if no orders are given, it seems that the master may sail to any one of the ports within the provisions of the charter-party. There is no obligation, in the absence of an express provision to the effect in the charter-party, for the master to give notice of the arrival of the ship at the port of call, for it is the duty of the charterer to be on the outlook for the ship (*d*).

Safe port.

The charterer, in giving orders, is bound to name a port (*e*) to which the ship may go with safety (*f*). Where a ship is, by a charter-party, to proceed to "a safe port" to be named by the charterers, they are not entitled to name a port, by nature

(*d*) *Sieveling v. Maas*, 6 E. & Bl. 670; *Nicholson v. Renwick*, Weekly Notes, 26th June, 1880, p. 119. There is sometimes inserted in the charter-party an express provision that the orders shall be given within twenty-four hours after notice of arrival at the port of call shall have been given to the charterer's agent, and that the demurrage days shall run if the ship is detained after that time.

(*e*) As to the meaning of "port," see *Brown v. Tayleur*, 4 A. & E. 241.

(*f*) It seems that a port into which a ship cannot enter when fully laden is not a safe port. See *The General Steam Navigation Company v. Slipper*, 11 C. B., N. S. 493. But where the charter-party contains the words "as near thereto as she may safely get," it seems to be open to question whether the ship may not be ordered to a port over the bar of which she cannot enter without discharging a portion of her cargo, provided there are means of safely discharging such portion outside the bar. See *The Alhambra*, Admiralty Division, 27th July, 1880. As to the meaning of the words "safe port," see the judgment of Wightman, J., in *Ogden v. Graham*, 1 B. & S. 773; 31 L. J., Q. B. 26. And see *supra*, pp. 316, 317. For the meaning of the words "as near as she can safely get," see *supra*, pp. 296, 317, and the judgment of Lord Campbell in *Schilizzi v. Derry*, 4 E. & Bl. 873; *Shield v. Wilkins*, 5 Ex. 304; *Capper v. Wallace*, 5 Q. B. D. 163; *Hayton v. Irwin*, 5 C. P. D. 130; *Nelson v. Dahl*, 12 Chan. D. 568; *Metcalf v. The Britannia Iron-works Company*, 2 Q. B. D. 423.

In *Capper v. Wallace*, 5 Q. B. D.

163, where, in accordance with orders given in pursuance of a charter-party, the ship was to proceed to a port in Holland some distance up a canal, or so near thereto as she could safely get, and, in order to enable the ship to get up the canal, it was necessary that at least one-third of the cargo should be discharged, and the charterers, who were bound by the terms of the charter-party to take cargo from alongside, refused to make any arrangement for taking delivery of any portion of the cargo at the mouth of the canal, it was held that the master was justified in considering the voyage at an end, and in treating the mouth of the canal as the place of discharge. But in this case the Court intimated an opinion that it could not be laid down as an inflexible rule that when a ship has got as near to the port as she can get, and the only impediment to proceeding further is overdraught, that the master is under all circumstances entitled to consider the voyage as at an end. "The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk, or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such case if the consignee is at hand to receive the surplus cargo and so relieve the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port." See also *Hillstrom v. Gibson*, 8 Sess. Ca., 3rd series, 463.

safe, but then closed by the local government, so that any vessel entering it without a permit, would be liable to confiscation (g).

In cases of necessity, as, for instance, where the ship is wrecked, or otherwise disabled in the course of the voyage and cannot be repaired, or cannot be repaired without too great a delay and expense, the master, acting as agent of his owner, may procure another competent vessel to carry on the goods and earn the freight. He is entitled, however, to a reasonable time within which to tranship (h). There is little authority in our law books as to whether it is the duty or only the right of the master to tranship, but although there is no express decision upon the subject there is no case in which such a duty has been declared. Transhipment has been treated merely as a power or privilege conferred upon the master for the benefit of the shipowner to secure the freight (i). But it is the duty of the master, as representing the shipowner, to take active measures where reasonably practicable for the preservation of the cargo from loss or deterioration in case of accidents. The master ought not to leave the cargo to perish, and in case of absolute necessity, where he has no means of communicating with the owners of the cargo, he may, to save the cargo, hypothecate the cargo, and where it is impossible to carry it on or preserve it he may even sell it (k).

TRANSHIP-
MENT.

Preservation
of the cargo.

When the ship has arrived at the place of her destination, the master must take care that she be safely moored or anchored, and without delay deliver the cargo to the merchant or his consignees

DUTY OF
MASTER AT
PORT OF DIS-
CHARGE.

(g) *Ogden v. Graham*, 1 B. & S. 773.

(h) *The Soblomsten*, L. R., 1 A. & E. 293.

(i) See *The Hamburg*, Br. & L. 253; *De Cuadra v. Swann*, 16 C. B., N. S. 772; *Notara v. Henderson*, L. R., 7 Q. B. 225. See also 3 Kent, Com. 210; *Shipton v. Thornton*, 9 A. & E. 316. The foreign jurists have differed on this question. The arguments on either side are shortly stated, and many of the foreign authorities on the subject are collected in the judgment in *Shipton v. Thornton*, *ubi supra*. In America it has been held, that it is the duty of the master to tranship where it is possible. 3 Kent, Com. 212. See, as to the duties of the master in

cases of injury to the ship, and as to the effect of transhipment on the contract of insurance, *post*, Chap. VII., INSURANCE, Part II. In *Meyer v. Ralli*, 1 C. P. D. 371, where the duty of the master to tranship and forward the cargo is alluded to in the judgment it is clearly intended to refer to the duty of the shipowner, not to the cargo owner.

(k) See *Tronson v. Dent*, 8 Moo. P. C. C. 419, 449; *The Gratitude*, 3 C. Rob. 258; *Morse v. The Australasian Steam Navigation Company*, 4 L. R., P. C. 222; *Acatos v. Burns*, 3 Ex. D. 282; and Chap. HYPOTHECATION AND SALE.

upon production of the bills of lading and payment of the freight (*l*). Under a charter-party providing for the delivery of the cargo at the usual place of discharge, the master is bound to take his ship to any usual place in the port to which the charterer may direct the ship to go (*m*).

**EXCEPTIONS IN
CHARTER-
PARTY.**

The charter-party usually contains the words, "the act of God, the Queen's enemies, and dangers of the seas excepted," or other words to a like effect. Similar words are usually inserted in bills of lading, and it will be convenient to consider the effect of these exceptions hereafter, when we treat of bills of lading (*n*).

**DISSOLUTION
OF CONTRACT.**

**By act of
parties.**

Contracts of affreightment may, like any other contracts, be dissolved by the consent of the parties; and at any time before breach it is not necessary that there should be any new consideration for the dissolution (*o*). It is, however, a rule of law that if the original contract is under seal, the contract of dissolution must be under seal (*p*). Contracts which are not by deed, but which by reason of the operation of the Statute of Frauds must be in writing, cannot be varied by a merely verbal agreement (*q*).

**Unforeseen
event pre-
venting per-
formance of
contract.**

It is an important general rule, of very frequent application, that where a party by his own contract creates a duty or charge, he is bound to perform it notwithstanding inevitable accident, since he might have provided against the contingency by the contract (*r*).

(*l*) Abbott on Shipping, 3rd ed., p. 244; *Fowler v. Knoop*, 4 Q. B. D. 299.

(*m*) *Kirchner v. Venus*, 12 M. P. C. 398; *The Felix*, 2 A. & E. 273; *Parker v. Winlow*, 7 E. & B. 942.

(*n*) See *post*, p. 350.

(*o*) *King v. Gillett*, 7 M. & W. 55; see also *Viner's Abridg. Contract*, G. 17. See *Adamson v. Newcastle Steamship, &c. Association*, 4 Q. B. D. 462, and see *post*, p. 332. The charterer's foreign agent has no implied authority to vary the cargo designated in a charter-party, nor to alter the place of loading; *Sickens v. Irving*, 7 C. B., N. S. 165; see also *Broadhead v. Yule*, 9 Sess. Ca. 13th series, p. 921. A ship's husband has no implied authority to cancel a charter-party; *Thomas v. Lewis*, 4 Ex. Div. 18.

(*p*) 5 Rep. 26 a.

(*q*) *Goss v. Lord Nugent*, 5 B. & A. 65. A subsequent verbal agreement which is not good under the statute cannot operate as a rescission of the original written contract; *Noble v. Ward*, L. R., 1 Ex. 117; 2 Ex. 135.

(*r*) *Paradine v. Jane*, Aleyn, 27; *Adams v. The Royal Mail Steam Packet Company*, 6 C. B., N. S. 492. "If a man chooses to enter into a contract to do a particular act he is bound to answer for it, although the performance of the act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract;" *per Brett, J., Jackson v. Union Marine Insurance Company*, L. R., 8 C. P., at

Thus, as we have seen, where time is expressly limited by the terms of the contract for the loading or discharge of the ship, the merchant will be liable if he neglects to perform the contract on his part, even though he may be prevented by some unforeseen event (*s*). So where, owing to the prevalence of an infectious disease at the port of discharge, all public communication with the shore became unlawful and impracticable, it was held that the loss must fall on the freighter, and that he was liable in damages for not performing his contract (*t*). The shipowner's contract is not dissolved, nor is it any excuse for its non-performance, that the delivery of the goods to the consignee is prevented by their wrongful seizure by Custom House officers (*u*).

Where the shipowners had covenanted to deliver the outward cargo, and "having done so" to receive on board a return cargo, and the freighters had covenanted that they would find and provide, "as they did warrant and assure to the shipowners," a full return cargo, it was held that the freighters were liable, on this covenant, for not having furnished a return cargo, although the delivery of the outward cargo was prevented by its seizure, without any default of the shipowners, at the outward port where it ought to have been delivered, by persons exercising the authority of Government there (*x*).

The shipowner also, unless the charter-party expressly provides against such a contingency, is not protected even against inevitable accident. Thus, where shipowners covenanted to proceed to one of the Guano Islands, and there "to load a full and complete cargo of guano by the ship's boats and tackle, and by the labour of the crew," it was held to be no excuse for the

p. 586. See *Jones v. St. John's College*, L. R., 6 Q. B. 115. This general rule is, however, subject to a qualification which is thus expressed by Hannen, J., in *Baily v. De Crespigny*, L. R., 4 Q. B., at p. 185:—"Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. See *Howell v. Coupland*, 1 C. P. D. 258.

(*s*) *Ante*, p. 317.

(*t*) Where by the charter-party the charterer undertakes to procure a pass necessary to enable the vessel to load at a foreign port he cannot excuse his neglect to provide cargo simply on the ground that the government authorities refused to grant a pass; *Kish v. Gibb*, 1 H. & N. 810.

(*u*) *Gosling v. Higgins*, 1 Camp. 451; *Spence v. Chodwick*, 10 Q. B. 617; and see also, as to the effect on the contract of the interference of the agents of the English government at a foreign port, *Evans v. Hutton*, 4 M. & Gr. 954.

(*x*) *Storer v. Gordon*, 3 M. & S. 308; and see *post*, Chap. VI., Part II., DAMURRAGE.

non-performance of this positive contract that no guano was to be found at the island (*y*).

But where the act to be performed is of such a nature that both parties must concur in doing it, and an unexpected event prevents each from doing his part, neither can maintain an action against the other for the non-performance of the act. Thus, in a case where a vessel was chartered to load a cargo at a named port, and by the regulations of the port the loading of the agreed cargo was prohibited, the charterers sought to recover damages against the shipowners for not loading the agreed cargo; but it was held that as neither of the parties were able to perform their respective duties under the contract, the plaintiffs being unable to load the cargo, and the defendants to receive it, the action could not be maintained (*z*).

Contract dissolved by performance becoming unlawful.

The general rule stated above is subject to this further qualification: that if after the contract is made it becomes unlawful for either party to perform it, then the performance cannot be insisted upon, nor can damages be recovered for the non-performance, because *lex non cogit ad impossibilia* (*a*).

Effect of war, &c.

Thus, it has been said, that if, after the making of the contract, the exportation of the articles which are to compose the cargo were prohibited by the law of this country, the contract would be considered to be dissolved, or, at all events, no damages could be recovered for its breach (*b*). And the breaking out of a war, or a local interdiction of commerce, arising subsequently to the making of the contract between the state to which the ship or cargo belongs and that to which it is destined, would have the same effect (*c*). It is otherwise with respect to an embargo, which operates only as a temporary suspension of the adventure, and such an impediment cannot, at least where the contract has been in part performed, be set up in answer to the

Of embargo

(*y*) *Hills v. Sughrue*, 15 M. & W. 253. The charter-party in this case provided also that certain disbursements were to be returned to the charterers "in the event of any unforeseen cause preventing the completion of the charter-party;" but the Court held that this stipulation could not be construed to mean that the contract by charter-party was to be at an end under circumstances such as those which had happened. See also *Puller v. Staniforth*, 11 East, 232, and *supra*, p. 322, n. (*r*).

(*z*) *Cunningham v. Dunn*, 3 C. P. D. 443. See also *Ford v. Cotencorth*, L. R., 5 Q. B. 544.

(*a*) *Baily v. De Crespigny*, L. R., 4 Q. B. 180.

(*b*) See the judgment of Lord Ellenborough in *Barker v. Hodgson*, 3 M. & S. 270. A prohibition at the port of discharge by a foreign government would not have this effect. See *Blight v. Page*, cited 3 B. & P. 295, note (*e*), and *Toutong v. Hubbard*, *ib.* 291.

(*c*) See *Abbott on Ship*, 596.

breach of a contract which has not provided against the contingency (d). But if the embargo is of an hostile character, and the object of the voyage is likely to be defeated by the delay, it seems that the contract may be treated as dissolved (e). Where an embargo was laid by the British Government upon foreign ships, as an act in the nature of reprisals and of partial hostility, it was held that no right of action could be founded in our Courts, by an owner of one of the foreign vessels against an English merchant, for a breach of contract which resulted only from his obedience to the orders of his own Government (f).

In recent years a number of cases have arisen having reference to the matter now under consideration, and although the decisions in many of them turn upon the meaning of express exceptions contained in the shipping documents, yet they are all so connected that it will be convenient to consider them together here.

Recent cases respecting the effect of war on contract of affreightment.

During the Crimean war, some important questions arose with reference to the effect of war on contracts of this description. In a case in the Court of Exchequer, it appeared on the pleadings that the plaintiff had agreed, at the request of the defendants, to execute an order for goods required by a merchant at Odessa, and that the defendants had for certain considerations undertaken to accept the plaintiff's draft for the invoice price of the goods. To a declaration setting out these facts, and alleging that the defendants had not accepted the plaintiff's draft, the defendants pleaded that at the time of the making of the agreement the merchant at Odessa was an alien, and that afterwards, before any breach of it, and before the time when the plaintiff was to have despatched the goods to him, he became and still was an enemy of the Queen, so that the plaintiff could not lawfully forward the goods to him. To this plea the plaintiff replied that in the declaration of war against Russia the Queen had waived the right of seizing enemy's property laden on board of neutral vessels, unless it was contraband of war, and that, by a

(d) *Hadley v. Clarke*, 8 T. R. 259. In this case the contract was considered to be suspended until the embargo was removed. See also *Scott v. Libbey*, 2 Johns (American) Rep. 336. In *Puller v. Staniforth*, 11 East, 232, and *Bell v. Puller*, 2 Taunt. 286, the charter-parties expressly provided for cases of interference with the contract by poli-

tical circumstances.

(e) Abbott on Shipping, 3rd ed. p. 411; and see *Rodocanachi v. Elliott*, L. R., 9 C. P. 518.

(f) *Touteng v. Hubbard*, 3 B. & P. 291. See the observations on this case by Blackburn, J., in *Geipel v. Smith*, L. R., 7 Q. B. 412, and see *post*, p. 332.

plaintiff and the defendant were British subjects, and the ship was a British registered ship; that Odessa was part of the Russian Empire, and that no licence from the Queen could be obtained for loading the ship, and that *the defendant could not have procured a cargo or loaded the ship without trading or corresponding with the enemy*. The Court of Queen's Bench held, under these circumstances, that the contract was dissolved before any breach of it by the defendant, and that he was entitled to judgment. The Court stated that it was material that the owners of the ship were alleged to be British, (since it was, on this account, the duty of the captain to make his escape from Odessa as soon as he heard of the declaration of war,) and it distinguished this case from the earlier decision, on the ground that the plea contained an averment negating the supposition that the defendant, before the declaration of war, could have provided a cargo from Russian subjects, or, after the declaration of war, could have loaded the vessel without trading with the enemy; an averment which, as we have seen, was not (according to the view afterwards taken by the Exchequer Chamber (l)) in any way necessary. Another case in the Court of Queen's Bench gave rise to some questions relating to this subject. In this case (m) the defendant contracted with the plaintiff, by charter-party, to load on board a ship of the plaintiff a cargo, at Odessa, at a certain rate of freight. The plaintiff's ship was to proceed from a British port to Constantinople, and thence to Odessa, and it was agreed that if before the ship arrived at Constantinople "war had commenced," the cargo was to be loaded at a reduced rate. It appeared that, in fact, before the ship had arrived at Constantinople war had been declared between Russia and Turkey, but not between England and Russia. The Court held, under these circumstances, that the contingency contemplated by the charter-party was war between Russia, the state in possession of the port of loading, and England, and this not having occurred before the arrival of the ship at Constantinople, that the contingency upon which the freight was to be reduced had not happened. In the same case it appeared that another charter-party had been entered into between the same parties, by which the defendant had

(l) See the judgment in *Esposito v. Bowden*, 7 E. & B. 763.

(m) *Avery v. Bowden*, 5 E. & B. 714; 6 E. & B. 953. See also *Barrick v. Buba*, 2 C. B., N. S. 563.

agreed to load another ship of the plaintiff at Odessa. To a declaration complaining that the defendant had not loaded the vessel, and alleging that the ship had waited at Odessa during some of the laying days, and that then the defendant had dispensed with her remaining for the residue of them, and requested her to depart, it was pleaded, among other pleas, that before the causes of action accrued war had been declared between England and Russia, whereby the performance of the agreement had been prevented, and the contract had been rescinded. It appeared on the evidence, that before the declaration of war the agent of the defendant at Odessa had repeatedly told the master that there was no cargo for the ship, and that she had better go away, but it was also proved that the master continued to require a cargo until the time at which the declaration of war between England and Russia had been known at Odessa, which time was before the expiration of the ship's laying days. Upon these facts the Court held that the plea was proved, that there was no evidence that the defendant had broken the charter-party by absolutely refusing to provide a cargo, and that even if the language used by the agent of the defendant had been stronger, this could not have been treated as a renunciation of the contract by the defendant, after the captain had continued, up to the declaration of war, to insist upon a cargo in fulfilment of the charter-party. And the principles upon which the latter portion of this decision proceeded were acted upon by the Court in a later case (*n*). It must be observed, however, that it has been distinctly laid down in recent cases, that where there is an explicit renunciation of a contract by the person bound to perform it, and this declaration is accepted by the other contracting party as a breach of the contract, a cause of action immediately arises even although the time for performance may not have arrived (*o*).

The principles laid down in the earlier cases were much discussed in the Admiralty Court and in the Privy Council, in cases which arose during the late war between France and Prussia. In one of these (*p*), the master of a Prussian brig

(*n*) *Reid v. Hoskins*, 5 E. & B. 729.

(*o*) *The Danube and Black Sea Railway Company v. Xenos*, 11 C. B., N. S. 152; *S. C.* in Cam. Scacc., 31 L. J., C. P. 284; 13 C. B., N. S. 825; *Frost v. Knight*, 7 L. R., Ex. 111; *Bloomer v. Bernstein*, L. R., 9 C. P. 588; *Ex parte*

Chalmers, L. R., 8 Ch. 289; *Morgan v. Bain*, L. R., 10 C. P. 15; and see also *Simpson v. Crippen*, L. R., 8 Q. B. 14; and *Freeth v. Burr*, L. R., 9 C. P. 208.

(*p*) *The Teutonia*, L. R., 3 A. & E. 394; 4 P. C. 171.

chartered his vessel to the plaintiffs, who were British subjects. The charter-party provided that the brig should load a cargo of nitrate of soda at a port in South America, and proceed therewith to Cork, Cowes or Falmouth, for orders to any safe port in Great Britain, or on the continent between Havre and Hamburg, that freight should be paid at the port of discharge at the rate of 45s. The freight to be paid if discharged in Great Britain one third cash and the remainder in bills on London at three months; if discharged in a port on the continent one third cash at the printed rates of exchange, &c., and the remainder, after delivery in cash, at the printed rates of exchange. The brig loaded the cargo and sailed on her homeward voyage. On the 10th of July, the brig arrived at Falmouth and received orders to proceed to Dunkirk, in France. She sailed for Dunkirk, and while off that port the master heard that war had broken out between France and Prussia. The brig then returned to the Downs, and after waiting a reasonable time to make enquiries, the master, on the 19th of July took his vessel into Dover and there remained. On that day war was actually declared between France and Prussia; the war had been imminent since the arrival of the vessel at Falmouth. The war continuing, the vessel remained at Dover, and was there at the commencement of the action. The plaintiffs demanded of the master delivery of the goods at Dover, but they made no offer to pay any freight. The master refused to comply with the demand, and the plaintiffs never gave the master orders to proceed to any other port than Dunkirk. In these circumstances, the plaintiffs contended that the master had committed a breach of contract in refusing to enter Dunkirk before the war was declared, and that as the cargo was the property of a neutral owner, the master was not justified in deviating from the direct course to avoid a danger to which the ship alone could be exposed. The Judicial Committee, however, held that the master was entitled to take reasonable and prudent steps for the preservation of his ship, and that he was, under the circumstances, justified in going to the Downs for the purpose of ascertaining whether war had actually been declared, and that he was guilty of no unreasonable delay in not returning to Dunkirk before the 19th of July, when war was actually declared. The plaintiffs, while they admitted that the master was not bound to proceed to Dunkirk after war had been

declared, contended, that as the breaking out of war rendered the performance of the charter-party illegal, that the contract between the parties was dissolved, and they were entitled to have the cargo delivered up to them at Dover without payment of freight. But the Court decided that as the charter-party provided that the cargo might be delivered at any one of a number of ports, and provided how freight was to be paid in the event of the cargo being delivered at an English port, that they ought not to hold that the contract was dissolved by the impossibility of delivering the cargo at Dunkirk; and as the plaintiff had demanded the delivery of the cargo at Dover and had not required the master to proceed to any other port except Dunkirk, that the master was justified in refusing to deliver the cargo at Dover, except upon payment of freight stipulated to be paid on delivery of the cargo at an English port.

Questions have also arisen as to the effect on the contract of Of blockade. affreightment of a blockade. On an attempt to enter a blockaded port in violation of the blockade, the blockading power is allowed by the law of nations to capture and condemn the vessel attempting to enter; and, after a public notification of the blockade, the act of sailing to the port, with the intention of violating the blockade, will itself be a cause of condemnation (*q*). And it is now well settled, that in cases of violation of blockade the master must be treated as the agent of the owner of the cargo, as well as of the ship, and that consequently the cargo owners cannot protect their property from capture in respect of the violation of a blockade, by showing that they were wholly innocent of the intention to violate it (*r*). This rule is not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, although they may be subjects or allies of the country which has established it (*s*). Where a public notice of a blockade has been given to the Government of a country, all parties contracting there must be taken to have entered into their contracts with an equal knowledge of its existence; any difficulty or impediment caused

(*q*) *The Neptune*, 2 Rob. 110. See also the judgments in *The Tutela*, 6 Rob. 180, and *Naylor v. Taylor*, 9 B. & C. 723. A ship which has entered a blockaded port before the blockade is entitled to come out again. See as to this, and as to the general princi-

ples regulating the law of blockade, the judgment of the privy council in *Cremidi v. Powell*, 11 Moo. P. C. C. 88.

(*r*) *Baltazzi v. Ryder*, 12 Moo. P. C. C. 168.

(*s*) *Id.*

by the blockade cannot, therefore, be set up as a dissolution of the contracts, or as an excuse for their non-performance (*t*).

But, although it is now clearly established that it is not contrary to the municipal law of England for a neutral vessel to attempt to enter a blockaded port (*u*), yet where the charter-party contains the exception "restraint of princes," the shipowner may delay to despatch his vessel to the port of discharge if, after the charter-party has been entered into, a blockade of the port is established; and if, before the cargo has been loaded or anything has been done towards performance of the charter-party, there is no prospect of the blockade being removed within a reasonable time, the shipowner may refuse to load the ship and may throw up the charter-party (*v*).

Effect of express stipulation to cancel in the event of blockade.

In a case where a ship was chartered to proceed to Galatz, for orders to load there or at other named ports, and the charter-party provided that "in the event of war blockade or prohibition of export preventing loading, the charter-party to be cancelled," it was held that, upon the closing of the ports by Russia in consequence of hostilities between Russia and Turkey, the charter-party came to an end without any election by either party (*x*).

Of a risk of capture.

A well-grounded fear of capture may justify a master in delaying for a reasonable time to prosecute his voyage or in deviating to a reasonable extent from the direct course of his voyage (*y*). But, at least in cases where the charter-party does not contain the exception "restraint of princes," the risk of capture will not justify delay so unreasonable in its character as to amount to a refusal to perform the contract (*z*).

Contract will not be treated

Where the shipowner agrees to deliver cargo at a named

(*t*) *The Adelaide*, 2 Rob. 111, note (*a*); *Madeiros v. Hill*, 8 Bing. 231.

(*u*) *Ex parte Chavasse*, 34 L. J., Bkty. 17; 11 Jur., N. S. 400; *The Helen*, L. R., 1 A. & E. 1. Nor is it unlawful to carry contraband of war into a blockaded port, provided the provisions of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), Supp. App. p. 152, or other similar statutes are not infringed. See 16 & 17 Vict. c. 107, and *Burton v. Pinkerton*, L. R., 2 Ex. 340.

(*v*) *Geipel v. Smith*, L. R., 7 Q. B. 412. See the judgment of Sir W. Scott in *The Tutela*, 6 Rob. 181. In America

it has been held, that by a blockade of the port of discharge, or an interdiction of commerce with it after the commencement of the voyage, the contract of affreightment is dissolved. See *Scott v. Libbey*, 2 Johns (American) Rep. 336; and see also, as to the law of blockade, *The Francis Lin*, 10 Moore, 37; *The Johanna Maria*, *ib.* 70.

(*x*) *Adamson v. The Newcastle Steam Ship, &c. Association*, 4 Q. B. D. 462.

(*y*) *The Heinrich*, L. R., 3 A. & E. 424; *The San Roman*, L. R., 3 A. & E. 583; 5 P. C. 301; *The Express*, L. R., 3 A. & E. 597.

(*z*) *The Patria*, L. R., 3 A. & E. 436.

port, although it may afterwards become unlawful to land the cargo at the ordinary landing place in the port, yet the contract will not be treated as dissolved if it can lawfully be carried out by discharging the goods elsewhere in the port without violating the law (a).

as dissolved if goods can lawfully be discharged at agreed port.

Charter-parties are very frequently executed by agents. Where they are not under seal the ordinary rules as to the parties to sue and be sued on such contracts are applicable. Where no difficulty is created by any special description of the parties in the contract, and it is made in the name of a person who is really an agent, evidence is admissible, even although he is not described as an agent, to show the existence of the agency, so as to give the benefit of the contract to the unnamed principal, or to charge him with the liability on it: but the agent cannot ordinarily get rid of his liability on a contract which he has executed in this form, by showing that he was merely an agent in the transaction (b). And where in a charter-party an agent described himself as "owner of the ship," it was held that the real principal could not sue upon it (c). But where the real principal described himself in the charter-party as an agent, and there was a stipulation that he was not to be personally liable, it was held that he might sue as principal, and that this stipulation only applied to him in his description or character of agent (d). Where, however, the parties have agreed that a person described in the contract shall be liable as agent only, the Court will, as between the parties, give effect to their intention, even though that intention was not expressed in the written document. Thus in an action upon a charter-party complaining of a refusal to load a cargo, the plea stated, by way of equitable defence, that the defendants had entered into the charter solely as agents for A. B. and Co.; that before they signed the charter, it was agreed and understood between them and the plaintiffs, that they were only to sign as such agents, so as to bind A. B. and Co., and not to make themselves liable as principals, and that they signed in the following manner:—"For A. B. and Co., of Messina, H. and Co. (the defendants), agents." The plea further stated, that the defendants and the plaintiffs *bond fide*

RIGHTS AND
LIABILITIES
OF AGENTS
EXECUTING
CHARTER-
PARTIES.

(a) *Waugh v. Morris*, L. R., 8 Q. B. 203; *The Cargo ex Argos*, L. R., 5 P. C. 161.

(b) *Higgins v. Senior*, 8 M. & W. 834.
(c) *Humble v. Hunter*, 12 Q. B. 310.
(d) *Schmale v. Avery*, 16 Q. B. 666.

believed at the time of signing the charter, that the defendants would not be liable personally on it, notwithstanding that it professed in the body of it to be made by the defendants as merchants and freighters; that the defendants had power to bind their principals, and that the latter were bound by the charter; and that the plaintiffs were inequitably taking advantage of the mistake in drawing up the charter, contrary to the real intention of the parties. This plea was held by the Court of Exchequer to show a good equitable defence, and the judgment was afterwards affirmed in the Exchequer Chamber (e).

The question which more frequently arises is whether, where an agent, acting for his principal, has entered into a charter-party, he has entered into it in such a form as to render himself personally liable. This depends upon the intention of the parties as disclosed by the language of the contract itself, and the mode in which it is signed. Where a person signs a contract in his own name, without qualification, he is *prima facie* a contracting party, and to prevent this liability from attaching it must appear clearly from the other portions of the agreement that he did not intend to act as a principal (f). If a contract not merely describes one of the parties as agent, but clearly indicates that he is acting only as such for a named principal, he is relieved from liability, although his signature is unqualified (g), and this is so whether the principal be resident in England or abroad (h). The signature, however, "as agent," is the strongest evidence to show that the person signing incurs no personal liability (i); but even this has been held to be

(e) *Wake v. Harrop*, 6 H. & N. 768; *S. C.* in *Cam. Scacc.*, 1 H. & C. 202. Some of the judges were of opinion that the plea disclosed a good defence even at law.

(f) *Parker v. Winlow*, 7 E. & B. 942; *Haugh v. Manzanos*, 4 Ex. Div. 104.

(g) *Gadd v. Houghton*, 1 Ex. Div. 357, and the comments therein upon *Paice v. Walker*, L. R., 5 Ex. 173.

(h) *Green v. Kopke*, 18 C. B. 549; *Mahony v. Kekule*, 14 C. B. 390; *Deslandes v. Gregory*, 2 E. & E. 602, 610. The fact that the principal is a foreigner is not to be thrown entirely out of consideration, for although there may be no difference in point of law between the case of an agent contracting on behalf of an English or a fo-

reign principal, there is an obvious distinction in the presumption to be drawn as a fact. See the judgment in *Leonard v. Robinson*, 5 E. & B. 125; *Armstrong v. Stokes*, L. R., 7 Q. B. 598; *Elbinger v. Kaye*, L. R., 8 Q. B. 313; *Hutton v. Bullock*, L. R., 8 Q. B. 331; 9 *id.* 572; 2 *Smith's L. C.* 418 (8th ed.). But with reference to the above cases it is to be observed that possibly the presumption of fact may not be so strong in the case of an agent executing a charter-party on behalf of a foreign principal, as in the case of an agent acting on behalf of a foreign merchant in the purchase of goods.

(i) *Deslandes v. Gregory*, 2 E. & E. 602, 610.

insufficient to release the agent from responsibility where it was inconsistent with the body of the contract (*k*).

It is not uncommon in cases where an agent enters into a charter-party in such a manner as to render himself personally responsible, for a clause to be introduced into the charter-party, declaring that the liability of the agent shall cease as soon as the cargo has been loaded. Where a charter-party, mentioning demurrage, was made between the shipowners and an agent for the freighters (no principal being named), and at the end of the charter it was stated that "the charter being concluded by A. B. (the agent) for another party, the liability of the former in every respect, and as to all matters and things, as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo;" it was held, that no action could be brought against the agent for demurrage at the port of discharge (*l*). So, in a similar case, where the cargo had been loaded before the commencement of the action, the agent was held to be protected by a similar clause from a claim for damages caused by delay in loading (*m*).

The construction of clauses of this character has given rise to some difficulty, but the rule to be deduced from the decisions is, that the words "all liability shall cease" do not operate to release the agent from vested rights of action, but only as from all liability arising after the loading of the cargo, unless, indeed, the charter-party clearly expresses an intention that the agent should be released *ab initio*. If there are words in the charter-party conferring a lien on the cargo in respect of demurrage at the port of loading, the circumstance will be regarded as giving

Cesser clause.

In what case an agent is personally liable.

(*k*) *Lennard v. Robinson*, 5 E. & B. 125. In this case a charter-party was entered into by merchants in London, who were mentioned in the body of the charter as if they were contracting parties, and they signed the charter "by authority of and as agents for" a merchant at Memel. It was held that they were, notwithstanding, personally liable on the contract. It may be doubted whether this has not been overruled by *Gadd v. Houghton*, 1 Ex. Div. 357; and although the principle given in the text may be safely accepted, all the decisions cannot now be reconciled. The modern tendency has been to relieve the agent from liability under circumstances where he

would have formerly been held liable. See the cases cited above and 2 Smith's L. C. 397 (8th ed.). Many of the cases affecting the question relate to agreement of sale and other contracts, and in referring to them it must be borne in mind that although the same principle applies to all contracts, the weight and importance of particular words as indicating the liability of the agent may vary with the subject-matter of and surrounding circumstance affecting the particular contract.

(*l*) *Oglesby v. Iglesias*, E., B. & E. 930.

(*m*) *Mileain v. Perez*, 30 L. J., Q. B. 91.

additional force to a cesser of liability clause, and indicating an intention on the part of the shipowners to rest upon their right of lien, and to discharge the agent altogether (*n*).

Where person
professing to
be agent has
no authority.

If a person, who has in fact no interest as principal, professes to act as agent for another, but without authority, and executes a contract in the name of that other person, putting the name of the latter to the instrument and adding his own name as agent for the alleged principal, he cannot be treated as a party to the contract or be sued upon it unless he can be shown to be the real principal; but an action for falsely assuming to act as agent may be brought against him (*o*). But in this case, as also in the case of a person describing himself in a written instrument as the agent of an unnamed principal, it is competent for the party with whom he contracts to show that although described as agent, he is in fact the principal (*p*), or that he had no principal (*q*), in either of which cases he will be liable. So also he may be, and often will be, liable on the implied promise that he is what he represents himself to be, namely, an agent having authority to contract as agent (*r*).

Where con-
tract by deed.

Where the contract is under seal different principles are applicable. An agent cannot bind his principal by deed unless he is authorized by deed to do so (*s*). And it is an established rule, that an act done under an authority under seal must be done in the name of the principal, and not in the name of the agent. No particular form of words is, however, necessary, so long as the act is done in the name of the principal (*t*). It was

(*n*) *Christofferson v. Hansen*, L. R., 7 Q. B. 509. A similar rule of construction has been adopted in cases where a similar clause has been adopted as to the cesser of the charterer's liability. See *Francesco v. Massey*, L. R., 8 Ex. 101; *French v. Gerber*, 1 C. P. D. 737; 2 C. P. D. 247; *Sanguinetti v. Pacific Steam Company*, 2 Q. B. D. 238. See *post*, Part II., DEMURRAGE. In a case where the charter-party contained the words "This charter being concluded by the charterers on behalf of another party, it is agreed that all liability of the former shall cease as soon as cargo is shipped, loading excepted," it was held that the last words extended to delay in loading and that the charterers remained liable for such delay, though they had shipped a com-

plete cargo; *Lister v. Van Haansbergen*, 1 Q. B. D. 269.

(*o*) *Jenkins v. Hutchinson*, 13 Q. B. 744; see also on this point the earlier cases of *Jones v. Downman*, 4 Q. B. 235, note (*a*); *Downman v. Williams*, 7 Q. B. 103; *Story on Agency*, ss. 264, 397; *Richardson v. Williamson*, L. R., 6 Q. B. 276.

(*p*) *Carr v. Jackson*, 7 Exch. 382.

(*q*) *Kilner v. Baxter*, L. R., 2 C. P. 255.

(*r*) *Collen v. Wright*, 7 E. & B. 301; 8 *id.* 647; *Randell v. Trimen*, 18 C. B. 786.

(*s*) *Horsley v. Rush*, cited 7 T. R. 209.

(*t*) *Combe's case*, 9 Rep. 79; *Wilks v. Back*, 2 East, 144.

also a rule at Common Law that if a deed be *inter partes*, that is to say, if it show on the face of it expressly who are the parties to it (as "between A. of the one part, and B. of the other part") no person not a party to it could sue on it, even although it appeared to have been made for his advantage and contained an express covenant with him (*u*). This rule does not, however, interfere with the liability of a person who has executed a deed containing a covenant by him, although he be not named therein as a party (*x*).

No action lies against the shipowners on a charter-party under seal executed by the master only; but the liability of the owners in respect of their general duties is not affected by the master having entered into a contract of this nature; they continue liable for the breach of any duties which are not inconsistent with the stipulations of the charter-party. And this rule applies even although the master who executed the deed happens to be a part owner also, if this fact does not appear on the charter-party, and is not known to the freighters (*y*).

We have already seen that the master has a special property in the vessel and in what cases he may sue in his own name (*z*).

It must be recollected that neither in the case of deeds, nor in that of contracts not under seal, could there, by the common law, be a transfer of the contract so as to give a right of action in the name of the transferee (*a*). A statutory exception to this rule has been introduced in the case of bills of lading by the 18 & 19 Vict. c. 111, and will be presently considered.

Transfer of contract.

Reserving the questions relating directly to the payment of freight to a later part of this Chapter, we proceed to consider secondly, *the contract for the carriage of goods shipped under a bill of lading, and the ordinary rights and liabilities resulting from it.*

(*u*) 2 Inst. 673; 2 Roll. Ab. Fairs, F. 1; *Berkley v. Hardy*, 5 B. & C. 355; and see the judgment in *Bushell v. Beavan*, 1 Bing. N. C. 120, and the judgment in *Torrington v. Lowe*, L. R., 4 C. P., at page 32. This rule is now subject to the limitation, unimportant so far as relates to the matters mentioned in the text, introduced by the 8 & 9 Vict. c. 106, s. 5. Where a class of persons is named in a deed one of that class may sue upon a covenant entered into for his benefit. *Reeves v.*

Watts, L. R., 1 Q. B. 412.

(*x*) *Salter v. Kidgley*, Carth. 76; *S. C.* Holt's R. 210; *Beckham v. Drake*, 9 M. & W. 79.

(*y*) *Leslie v. Wilson*, 3 B. & B. 171.

(*z*) See *ante*, pp. 111—112, and cases there cited.

(*a*) *Splidt v. Bowles*, 10 East, 279; *Moore v. Hopper*, 2 N. R. 411. By sect. 25, sub-sect. 6 of the Judicature Act, 1873, choses in action may now be assigned.

BILL OF
LADING.

Where a ship is not chartered wholly to one person, but the owners offer her generally to carry the goods of any merchants who may choose to employ her, or where one merchant to whom she is chartered offers her to several sub-freighters for the conveyance of their goods, she is called a general ship. In these cases the contract entered into by and with the owners, or the master on their behalf, is evidenced by a bill of lading (b). As there is great convenience in having a bill of lading, even in cases where the ship is chartered wholly to one person, by whom the whole cargo has been shipped, it seldom happens in any case that the goods are shipped without a bill of lading.

Mate's
receipt.

The bill of lading is a document acknowledging the shipment of the goods (b). It is generally signed by the master (c). In practice when goods are shipped an acknowledgment known as the "mate's receipt," is, in the first instance, given by the mate. This is afterwards exchanged by the captain or the broker of the ship for the bill of lading. Although this is the usual and more safe practice, the master, if he is satisfied that the goods are on board, and has no notice of any interest in them except that of the shipper, may sign bills of lading in the shipper's favour, without the production of the mate's receipt, and in such a case the holder for value of these bills of lading has a better title than the indorsee of the mate's receipt (d).

Several parts, that is to say, duplicates of the bill of lading, are commonly made out; one or more of these is sent by the shipper of the goods to the person for whom they are intended, one is retained by the shipper himself, and another is kept by the master for his own guidance.

The following form contains the principal terms which are usually met with in ordinary bills of lading (e):—

Shipped in good order and condition by [*A. B. merchant*] in and upon the good ship called [*The Coventina*] whereof [*C. D.*]

(b) *Caldwell v. Ball*, 1 T. R. 216.

(c) In some trades it is a custom, in the case of steamships, for the brokers, and not the master, to sign the bills of lading. See *Hayn v. Culliford*, 3 C. P. D. at p. 414. *S. C.* on appeal, 4 C. P. D. 182. See also *Jessel v. Bath*, L. R., 1 Ex. 267.

(d) *Hathesing v. Laing*, L. R., 17 Eq. In this case a usage to the contrary was set up, but not established.

(e) The forms of bills of lading in actual use are very various. Nearly

all the large shipping companies have their own forms, which contain a great number of special provisions. The decisions upon the meaning of many of these will be noticed hereafter. See *post*, p. 350. But it may be convenient to mention here that it is not uncommon to insert in bills of lading provisions entitling the ship to tow and assist vessels in all situations. Without such provisions, a deviation for the purpose of salvage, other than life salvage, entails a liability upon the shipowner. *Scara-*

is master for this present voyage and now moored in the [*River Tyne*] and bound to [*Cadiz in Spain, twenty cases of machinery and fifty casks of soda*] being marked and numbered as in the margin and are to be delivered in the like good order and condition at the aforesaid port [*of Cadiz*] *the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever kind or nature soever excepted* unto [*E. F. merchant*] or to his assigns he or they paying freight for the said goods £ per ton delivered with primage and average accustomed. In witness whereof the master of the said ship hath affirmed to [*three*] bills of lading all of this tenor and date one of which bills being accomplished the others to stand void.

Dated at [*Newcastle-upon-Tyne*] the ——— day of ———.

It is usual for the master when signing bills of lading to add in the margin such words as weight, contents, value or quality unknown. We shall hereafter consider the effect of these or similar words (*f*).

Every bill of lading for any goods, merchandize or effects to be exported or carried coastwise is liable to a sixpenny stamp (*g*). A bill of lading may not be stamped after its execution, and any person who makes or executes any bill of lading not properly stamped, is liable to forfeit 50*l.* (*h*).

The master in signing bills of lading generally acts as the agent of the owners; but, in some cases, he acts on these occasions as the agent of the charterers.

Character in which master acts in signing bills of lading.

Where, as is not now uncommon, a ship is chartered at a lump sum, and it is intended that she shall be put up by the charterers as a general ship (the master and crew being still employed and paid by the owners) and the charter-party provides that the master shall sign bills of lading at such rates of

manga v. Stamp, 4 C. P. D. 316; 5 C. P. D. 296. In the case of steam vessels, it is now usual to add to the exceptions the words "*accidents from machinery, boilers, steam.*" The bills of lading used by the Peninsular and Oriental Steam Navigation Company except also "*detentions consequent upon the conveyance of her Majesty's mails,*" and contain a provision that the company will not be answerable for leakage

or breakage. See, as to such a provision, *Phillips v. Clark*, 2 C. B., N. S. 156. The form of a French bill of lading (*Connaissement*), and the law relating to it, will be found in the Code de Commerce, Arts. 281 to 286.

(*f*) See *post*, p. 341.

(*g*) The Stamp Act, 1870 (33 & 34 Vict. c. 97), Sched.

(*h*) *Id.* s. 56.

freight as the charterers may direct, without prejudice to the charter, it is often a question of difficulty to determine whether the master acts, in signing the bills of lading, as the agent of the charterers or of the owner. The character in which he acts is a question of fact depending upon the particular circumstances of each case (i).

But when a person, without any knowledge of a charter-party, ships goods under a bill of lading, signed by the master, it seems to be clear, at least in cases where the charter-party does not operate as a demise of the ship to the charterer, that the act of the master in signing the bill of lading must be taken as between the owner and the shipper as an act to be done by him as the agent of the owner (k). When a ship is advertised as a general ship, a person who ships goods in her is not bound to inquire whether there is any charter-party, and if the master refuses to sign bills of lading, except subject to a charter containing objectionable provisions, the shipper, if he had no notice of the charter, is entitled to have his goods returned (l).

Reference in
bill of lading
to charter-
party.

In many cases, however, where a ship is put up as a general ship by the charterer, goods are shipped by the shipper with

(i) In *Marquand v. Banner*, 6 Ell. & Bl. 232, it was held that the master in signing bills of lading acted as agent for the charterers. It may, however, be doubted whether this decision would have been upheld if the question had been taken to a Court of Error. See also the observations on this case in *Gilkinson v. Middleton*, 2 C. B., N. S. 153—155; and *Kirchner v. Venus*, 12 Moo. P. C. C. 361. In *Wagstaff v. Anderson*, 5 C. P. D. 171, it seems to have been held that the master in signing bills of lading acted as agent for the shipowner. See *Colvin v. Newberry*, 8 B. & C. 166; 1 Cr. & J. 192; 7 Bing. 190; 1 Cl. & F. 283; *The Omoa Coal and Iron Company v. Huntley*, 2 C. P. D. 464. The charterers are not bound, in the absence of custom or express contract, to hand over to the ship-owners copies of the bills of lading of the goods put on board. *Dutton v. Powles*, 2 B. & S. 174; *S. C.* in Cam. Soc. *ib.* 191.

(k) *Sandeman v. Scurr*, L. R., 2 Q. B. 86. The judgment of the Court, delivered by Cockburn, C. J., contains the following passage:—"We proceed on the well-known principle that where a party allows another to appear before the world as his agent in any given

capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and, therefore, acting for his owners in signing bills of lading. It may be that as between the owner, the master and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only and not of the owner. But in our judgment this altered state of the master's authority will not affect the liability of the owner whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office." See *The St. Cloud*, Br. & L. 15; *The Patria*, 3 L. R., A. & E. 436; *The Figlia Maggiore*, L. R., 2 A. & E. 111; *Hayn v. Culliford*, 3 C. P. D. 410; 4 *ib.* 182.

(l) *Peck v. Larsen*, L. R., 12 Eq. 378. See also *Hayn v. Culliford*, 3 C. P. D. 410; 4 *ib.* 182.

notice of the charter-party, and under bills of lading, which contain a reference to the charter-party, and stipulate for payment of "freight and other conditions as per charter-party." In such cases the shipper is, of course, bound by such of the provisions of the charter-party as are referred to in the bill of lading (m).

It is important that the master should see that there are no mistakes or erroneous statements introduced into the bills of lading. A bill of lading commonly states that the goods are shipped in good order and condition, and are to be delivered in like good order and condition, and a bill of lading in such a form is commonly called a *clean bill of lading* (n). But as it frequently happens that when the goods are shipped the master has no means of judging of the quality or condition of the goods, or even of the nature of the contents of the packages put on board, it is usual to qualify the statement in the body of the bill of lading by adding in the margin or at the foot of the bill of lading "weight, contents, and value unknown," or similar words. Where this is done the words so added control the bill of lading, and operate to relieve the master and owners from any statements contained in the body of the instrument relating to the weight, contents, and value of the goods which are not true in fact (o).

Statements in bill of lading as to condition of goods.

Weight, contents, &c., unknown.

(m) The effect of such a reference with regard to the liability of the shipper for the chartered freight and demurrage, will be considered in a later part of this chapter. See *infra*, p. 387; see also *Gray v. Carr*, L. R., 6 Q. B. 522; *Porteus v. Watney*, 3 Q. B. D. 536. In the latter case, Brett, L. J., said:—"The bill of lading is on paying freight and other conditions as per charter-party. . . . I take the decision in *Gray v. Carr* to have been that these words in a bill of lading are to be treated as words of reference to the charter-party, and that they, therefore, introduce into the bill of lading every condition that is in the charter-party by way of reference, so that they bring into the bill of lading every condition of the charter-party in its terms, and make every one of those conditions part of the bill of lading as if they had been originally written into it. But then there is another rule which applies, which is that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and

inapplicable, they must be struck out as insensible, not because they are not introduced, but because being introduced they are impossible of application." But the particular words of reference in each case are important; it does not follow because the bill of lading contains a simple reference to the charter that all its exemptions are to be taken as incorporated. *Russell v. Nieman*, 17 C. B., N. S. 163; *The San Roman*, L. R., 3 A. & E. 583.

(n) A clean bill of lading is certainly *prima facie* evidence as against the owners that the goods were shipped in good condition, although it is not conclusive evidence. As to the nature of the obligation imposed by a clean bill of lading, see *Steel v. The State Line Steam Ship Company*, 3 App. Ca., per Lord Cairns, at page 76.

(o) *Jessel v. Bath*, L. R., 2 Ex. 267. If the master qualifies his acknowledgment by the words contents unknown he acknowledges nothing; per Lord Mansfield, *Haddon v. Parry*, 3 Taunt. at page 306. See also *The Ida*, 2 Asp.

In a case where a shipowner received a case of goods described in a bill of lading as linen goods, and the master wrote on the bill of lading "weight, value, and contents unknown," on the arrival of the ship at her destination it was discovered that the goods were silk goods, on which a higher freight ought to have been paid, and that a portion of the goods had been abstracted from the cases. In an action against the shipowner for the non-delivery of the goods so abstracted, it was held that the effect of the words added by the master was to do away with the description of the goods as linen goods, and that the contract was to carry the case and its contents whatever it might be (*p*).

Statement
that freight
has been paid.

Where the bill of lading stated incorrectly that the freight had been paid, it was held that the shipowners were estopped from claiming it from the assignees of the bill (*q*). But, as between the original parties, the bill of lading, like any other

Mar. Law Ca. p. 551, where the Privy Council held that a bill of lading stating the goods to have been shipped in good order and condition, but having written across it the words "quantity and quality unknown," afforded no evidence that the goods were shipped in good condition. In *The Peter der Grosse*, 1 P. D. 414, reported on appeal, 3 Asp. Mar. Cas. 196, the bill of lading stated that the goods were shipped in good condition, and contained in the margin the words "weight, contents and value unknown." It was held that the effect of the statements in the bill of lading taken together must be considered to admit that the goods when shipped were, as far as they could be seen, in good order, and that by adding the words in the margin the master did no more than say that he did not admit anything as to the contents of the packages, which he could not see. See also *Bradley v. Dumipace*, 31 L. J., Ex. 210, 7 H. & N. 200, 1 H. & E. 521, where on special grounds the words "contents unknown and not responsible for weight" were held to have no application to the particular circumstances of the case. The grounds of the decision are to be best gathered from the judgment of Bramwell, B., in the Court of Exchequer. As to statements of weight see *Blanchet v. Powell's Llantwit Collieries Company*, L. R., 9 Ex. 74, and see *post*, p. 379. Where, as is commonly provided in grain charter-parties that in the event of the cargo

being delivered in a heated condition, the freight shall be payable on the invoice quantity taken on board as per bill of lading, or half freight upon the heated portion at master's option, the fact that the words quantity and quality unknown have been added to the bill of lading do not operate to prevent the master exercising his option to be paid freight on the invoice quantity as per bill of lading. *Tully v. Terry*, L. R., 8 C. P. 679. For the American cases see *Parsons on Shipping*, 198; *Clark v. Barnwell*, 12 How. 272.

(*p*) *Lebeau v. The General Steam Navigation Company*, L. R., 8 C. P. 88. In this case the jury found that the misdescription arose from inadvertence. Had there been fraud in the case different considerations would have applied.

(*q*) But as it is not to be presumed that the master has acted without authority, a clean bill of lading is still *prima facie* evidence against the shipowner, and the onus of proving that a smaller quantity was actually shipped rests upon the shipowner. *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; *Brown v. Powell*, L. R., 10 C. P. 562. Until the goods are on board a bill of lading is of no validity. But if the goods are afterwards put on board without a new destination, the bill of lading attaches just as if they had been on board at the time. See per Willes, J., *Gattorno v. Adams*, 12 C. B., N. S., at page 567.

receipt, may, subject to the statutory provision about to be mentioned, be shown to be accidentally incorrect.

The master has, as against his owners, no authority to sign bills of lading for goods not received on board; nor has he power to nor does he charge his owners by signing bills of lading for a greater quantity of goods than those on board (*r*); and all persons taking bills of lading by indorsement, or otherwise, must be taken to have notice of this. Therefore, where a bill of lading was signed by the master in the usual form, but for goods which were never received on board, and it was deposited with the plaintiffs by the parties to whom the master had delivered it, as a security for advances by the plaintiffs to them, and was indorsed by them to the plaintiffs, together with a bill of exchange which was afterwards dishonoured, it was held in an action against the owners of the ship in which the plaintiffs alleged that they had advanced money on the bill of exchange confiding in the truth of the bill of lading, that they could not recover the amount for which the bill of lading, if true, would have been a good security (*s*).

Master has no authority to bind his owners by giving bill of lading for goods not on board.

But the position of the master himself or of the person actually signing is different, for by the 18 & 19 Vict. c. 111 (*t*), every bill of lading in the hands of a consignee or indorsee for value (*u*), representing goods to have been shipped on board a vessel, is conclusive evidence of the shipment as against the master or other person who signs it, notwithstanding the goods, or part of them, may not have been so shipped (*x*). This regulation is not, however, applicable if the holder of the bill of lading has actual notice at the time when he receives it that the goods have not been laden on board; and the person who signed the bill of lading may exonerate himself by showing

When bill of lading conclusive as against the master or other person signing.

(*r*) *Hubbersty v. Ward*, 8 Exch. 330; and see *Coleman v. Forbes*, 24 L. J., C. P. 125.

(*s*) *Grant v. Norway*, 10 C. B. 665; *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289; and see as to an action at common law by the indorsee of a bill of lading against the master for a false statement contained in it, *Gadsden v. McLean*, 9 C. B. 283.

(*t*) See s. 3, Append. p. clxxvii.

(*u*) See as to the meaning of these words *Meyer v. Dresser*, *supra*.

(*x*) The master, however, it seems is

not estopped by a mere statement of weight of the goods shipped contained in the bill of lading. In an action by a master for a lump sum for freight the defendants pleaded that the plaintiff had by bill of lading acknowledged to have received more than 127 tons, and he carried and delivered 127 tons only. A replication by the plaintiff that he carried all the goods delivered to him, and that the goods described in the bill of lading as weighing more than 127 tons in fact weighed 127 tons only, was held good. *Blanchet v. Powell's Llantwit Collieries Company, Limited*, L. R., 9 Ex. 74.

that the misrepresentation was caused, without any default on his part, by the fraud of the shipper or holder of the bill of lading, or of some person under whom he claims (y).

Negotiability
of bill of
lading.

A bill of lading, by which the master undertakes to deliver to order or assigns (z), is by the mercantile law a negotiable instrument, and by its indorsement the property in the goods to which it relates may be transferred, whether the indorsement is to a particular person, or in blank and accompanied by a delivery to the party to whom it is intended to pass the property (a). When the vessel is at sea and the cargo has not arrived, the parting with the bill of lading is parting with that which is the symbol of the property, and which, for the purpose of conveying a right and interest in the property, is the property itself (b). The actual holder of a bill of lading may also transfer by indorsement the property in the goods, subject only to the right of the unpaid vendor to stop the goods *in transitu*. The indorsement of a bill of lading does not become irrevocable immediately on its being made; for although, as between the shipper of the goods and the master, it determines the person to whom, at the time the former intends that the goods should be delivered, the shipper may change his purpose, at any rate before the delivery of the goods, or of the bill to the party who is named in it (c). And an insolvent vendee may, by a *bond fide* indorsement for value, defeat the right of the unpaid vendor to stop the goods *in transitu* (d).

(y) See s. 3. The words of the section are very general, and include the fraud of any person by whom the goods are shipped. See *Valieri v. Boyland*, L. R., 1 C. P. 383.

(z) A bill of lading not containing these words is, it seems, not a negotiable instrument. See *Henderson v. The Comptoir d'Escompte de Paris*, L. R., 5 P. C. 253. See the same case as to the circumstances which may operate as constructive notice to an indorsee of an equitable right of the consignor to the goods as against the consignee named in the bill of lading.

(a) See *Evans v. Marlett*, 1 Lord Raym. 271; *Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21, note; *Wright v. Campbell*, 4 Burr. 2046; *Hibbert v. Carter*, 1 T. R. 745; *Shepherd v. Harrison*, 5 L. R., H. L. 116; see also the notes to *Lickbarrow v. Mason*,

1 Smith, L. C. 729, 8th ed.

(b) *Barber v. Meyerstein*, L. R., 4 H. L. 317. The bill of lading remains in force until there has been a complete delivery. *Ib.*

(c) See the judgment of Lord Denman, C. J., in *Mitchel v. Ede*, 11 A. & E. 903.

(d) *Lickbarrow v. Mason*, *ubi supra*; *Leask v. Scott*, 2 Q. B. D. 376; and see the judgment of Tindal, C. J., in *Jenkyns v. Osborne*, 7 M. & Gr. 699; *The Marie Joseph*, Br. & L. 449; L. R., 1 P. C. 219. In this case the Privy Council (reversing the decision of Dr. Lushington in the Admiralty Court) held that the title of a *bond fide* indorsee was good as against an unpaid vendor, although the immediate possession of the indorser was obtained by fraud. See also *Coventry v. Gladstone*, L. R., 4 Eq. 493; *The Argentina*, L. R., 1 A. & E. 370; *Rodger v.*

It is necessary to observe, in describing the general character of the contract, that although formerly a bill of lading was not negotiable in the sense in which a bill of exchange is negotiable, since the indorsee could not maintain an action upon it in his own name (e), a material alteration has been made in this respect by a modern statute (the 18 & 19 Vict. c. 111) (f), which provides that every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods mentioned in it passes upon or by reason of the consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself. This statute has put an end to the great inconvenience which existed under the old system from the fact that the beneficial interest in the goods and the rights of action in respect of the carriage were in these cases vested in different persons. It is to be observed that the statute does not apply to every assignee of a bill of lading, but only to an assignee to whom the property in the goods passes. But where it is proved that the person in the possession of the bill of lading indorsed it for value to the plaintiff, and the circumstances raise no suspicion of fraud, the Court will presume that the property passed by the indorsement (g).

The 18 & 19
Vict. c. 111.

In a case since the above-mentioned Act, goods had been shipped by the defendant on board the ship of the plaintiff, and a bill of lading had been signed by the master, stating that the goods had been shipped by the defendant as agent, and were to be delivered abroad "unto order or assigns, he or they paying freight for the goods." The goods had, in fact, been shipped on account of a third person, to whom, before the shipment, the shipowners had made advances, upon an undertaking that he would indorse to them as security a bill of lading of the goods, wherein freight should be payable by him in this country. The defendant indorsed the bill of lading to the person on whose account the goods had been shipped, who indorsed it to the ship-

Effect of indorsement on the liability to pay freight, &c.

Comptoir d'Escompte de Paris, L. R., 2 P. C. 393. See *Gilbert v. Guignon*, L. R., 8 Ch. 16, as to an indorsement by mistake; and see *post*, Part II, where the subject of stoppage in transitu is fully considered.

(e) *Sanders v. Vanzeller*, 4 Q. B. 260; *Thompson v. Dominy*, 14 M. & W. 403;

Howard v. Shepherd, 9 C. B. 297. See also *Tindall v. Taylor*, 24 L. J., Q. B. 16.

(f) See s. 1, Append. p. clxxvi. The right of stoppage in transitu is not affected by this provision. See s. 2.

(g) *Dracachi v. The Anglo-Egyptian Navigation Company*, L. R., 3 C. P. 190.

owners, but did not pay the freight. It was held, under these circumstances, that the defendant was liable under the bill of lading to pay the freight to the shipowners, and that the 18 & 19 Vict. c. 111, did not vest the property in the goods in the shipowners or indorsees of the bill of lading, so as to deprive them of their right to sue the defendant for the freight (*h*). It has been also held, that an indorsee of a bill of lading, who has indorsed it over before the arrival of the vessel and delivery of the cargo, does not, under this statute, remain liable for the freight (*i*). A consignee named in a bill of lading cannot, however, escape his liability for freight by simply indorsing the bill of lading to a third person, to whom the property in the goods does not pass (*k*).

Where cargo was shipped on board the plaintiff's vessel under a bill of lading, by which the cargo was to be delivered to the defendant or his assigns, and the defendant before the arrival of the ship sold the cargo, and the purchaser took delivery of the cargo upon an order signed by the defendant, and neglected to discharge the cargo within a reasonable time, it was held that the defendant, although he had ceased to have any beneficial interest in the cargo before the arrival of the ship, yet, inasmuch as he had never assigned the bill of lading, and as against the plaintiff he retained all the rights of owner, he remained a consignee within the meaning of the Act, and was liable for the delay in discharging the cargo (*l*). Where a consignor ships goods under a bill of lading making the goods deliverable to order or assigns, and indorses the bill of lading to a third person, who afterwards re-indorses the bill to him before the bill of lading has been fulfilled, the consignor is by the re-indorsement remitted to his original rights (*m*).

(*h*) *Fox v. Nott*, 6 H. & N. 630.

(*i*) *Smurthwaite v. Wilkins*, 11 C. B., N. S. 842.

(*k*) *Lewis v. M'Kee*, 2 L. R., Ex. 37, which was an action for freight against the consignee. He pleaded that the bill of lading was, "deliver to W. & K. or order, looking to them for all freight, dead freight and demurrage, without recourse to us," and that the plaintiff accepted the indorsement and delivered the goods in pursuance of it to W. & K. This was held a good plea. Upon the trial, however, of the issues in fact, it appearing that the captain never saw or assented to the indorsement, and

that no property in the goods passed by the indorsement, the Court held that the defendant was still liable. See *Lewis v. M'Kee*, L. R., 4 Ex. 58.

(*l*) *Fowler v. Knoop*, 4 Q. B. D. 299. And see *Smurthwaite v. Wilkins*, 11 C. B., N. S. 842.

(*m*) See *Short v. Simpson*, L. R., 1 C. P. 249. In this case the bill of lading was re-indorsed after the wrongful delivery of the goods to a third person. It was held that the wrongful delivery was no delivery, and that therefore at the time of the re-indorsement the bill of lading remained unfulfilled. But the Court intimated that if the goods had been

The provisions of the Factors' Acts enable any agent entrusted with the possession of goods or of the documents of title to goods, including bills of lading, to give validity to any contract by way of pledge, lien or security, *bonâ fide* made on the security thereof, as also for any further or continuing advance in respect thereof, notwithstanding the person claiming such pledge or lien shall have notice that the person with whom such contract is made is only an agent (*n*). And when the goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor, or any person or agent entrusted by the vendor with the goods or documents, shall be as valid and effectual as if such vendor or person were an agent entrusted by the vendee with the documents, provided that the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold (*o*).

PROVISIONS OF
THE FACTORS
ACTS AS
AFFECTING
BILLS OF
LADING.

Under a contract for the sale of goods other than specific goods, the property does not pass to the purchaser unless there is an appropriation of the specific goods to pass under the contract. In ordinary cases, where there is no bill of lading, the delivery by the vendor of goods on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property (*p*).

PASSING OF
THE PROPERTY
IN THE GOODS
SHIPPED.

But where goods are delivered on board a ship to be carried, and a bill of lading is taken, the bill of lading is the symbol of the property, and controls the contract, and the terms of the bill of lading, or the manner in which it is dealt

Effect of bill
of lading on
the passing of
the property.

delivered in fulfilment of the bill of lading before the re-endorsement a very different question would have arisen.

(*n*) 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39.

(*o*) 40 & 41 Vict. c. 39, s. 3. See also sect. 4, containing similar provisions in cases where vendees are allowed to have possession of documents of title.

(*p*) But in all cases this is a question of intention, to be gathered from all the particular circumstances. In *Falke v. Fletcher*, 18 C. B., N. S. 403, 34 L. J., C. P. 146, the plaintiff, who was employed to ship a cargo at Liverpool for a merchant in London on board a

ship chartered by the merchant, shipped a portion of the cargo and took mate's receipt in his own name. When this quantity had been placed on board the merchant stopped payment, and the plaintiff, who had advanced money for the purchase of the goods, ceased loading and demanded bills of lading for the goods already loaded in his own name. The defendant, the ship-owner, refused to allow them to be given, and fitted up the ship and sent her on a foreign voyage. It was found as a fact that the plaintiff did not intend to pass the property to D., and it was held that the defendant was liable for the conversion of the goods.

with, may indicate an intention on the part of the consignor to retain the property in the goods or to reserve the *jus disponendi*; and in such case the effect of the delivery of the goods is restrained (*g*).

If the vendor, on shipment, takes a bill of lading, which provides that the goods shall be delivered to his own order, that is ordinarily sufficient to prevent the property from passing to the vendee, or at least is sufficient to reserve to the vendor the right of disposing of the goods (*r*). But, even in such a case, if the vendor acts merely as agent for the vendee, and delivers the goods to the master really for and on account of the vendee, notwithstanding the form of the bill of lading, it seems that the property would be held to pass; for in every case it is a question of fact, having regard to all the circumstances, whether the delivery on board ship was a delivery for and on account of the vendee (*s*).

So, where a vendor, even if he takes a bill of lading providing for the delivery of the goods to the vendee, or indorses the bill of lading to the vendee, yet retains control over the bill of lading, or deals with it in such a way as to indicate that he intends to retain control over the goods, there is no absolute appropriation of the goods until the price is paid.

In such a case the vendee cannot claim the goods until he has paid or tendered the price; although, if it appear that the sole intention of the vendor in reserving control over the goods was simply to secure payment of the price, the vendee is entitled to demand delivery of the goods on paying or tendering the price (*t*).

(*g*) See *Mirabita v. The Imperial Ottoman Bank*, 3 Ex. D. 164; Benjamin on Sale, 1st ed. p. 289.

(*r*) *Jenkyns v. Brown*, 14 Q. B. 496. See the judgment of Sir William Scott in *The Packet de Bilbao*, 2 Rob. at page 136; *Wait v. Baker*, 2 Ex. 1; *Ellershaw v. Magniac*, 7 Ex. 570. In his judgment in *Mirabita v. The Imperial Ottoman Bank*, Lord Justice Bramwell says, "I think it is not necessary to enquire whether what the shipper possesses is a property strictly so called, in the goods, or a *jus disponendi*, because I think whichever it is the result must be the same."

(*s*) See the judgment of Parke, B., in *Van Casteel v. Booker*, 2 Ex. 691, at page 709. See also *Ogle v. Atkinson*, 5 Taunton, 759; *Anderson v. Clark*, 2 Bing. 20. If from all the facts it may

fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shows that there was no intention to pass the property; but, if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result. Per Williams, J., in *Joyce v. Scurran*, 17 C. B., N. S., at page 102. See *Seagrave v. Union Marine Insurance Company*, L. R., 1 C. P. 305; *Moakes v. Nicholson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273; *Brown v. Hare*, 4 H. & N. 822.

(*t*) *Mirabita v. The Imperial Ottoman Bank*, 3 Ex. D. 165. But see *Wait v. Baker*, 2 Ex. 1, which seems to have been decided on the ground that the vendor in that case never intended the

The right reserved by the vendor in such a case is more than a lien, and involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default (*u*).

It is a common practice for the vendor of goods to forward the bills of lading indorsed to his agent or banker, with instructions to hold the bills of lading until the vendee has paid the price of the goods, or accepted bills for the price. Such a mode of dealing with the bills of lading is ordinarily clear evidence of an intention on the part of the vendor to retain his property, or at all events the *jus disponendi*, in the goods until the price is paid or the bills are accepted (*x*). Even where the bill of lading duly indorsed comes into the possession of the vendee, yet if the vendee has notice that it was the intention of the vendor that he should only obtain possession of the bill of lading on condition of his accepting bills of exchange drawn on the vendee, and sent with the bill of lading, the vendee has no right to retain the bill of lading without accepting the bills (*y*).

When bills of lading are forwarded to agent to hold till bills of exchange accepted.

Where the vendor was bound by contract to ship ore from certain mines, on account of the plaintiffs, on board ships chartered by them, and he persisted in shipping ore from the mines on board ships chartered by the plaintiffs on his own account and not on account of the plaintiffs, and took bills of lading, making the cargo deliverable to the order of a sham nominee of his own, it was held that no property passed to the plaintiffs (*z*). But in a case decided since the Judicature Acts, where there was an engagement between the consignee and the plaintiff that the goods should be bought with the money of the

Special circumstances affecting the passing of the property.

property to pass except on such terms as he chose to exact. But it may be open to doubt what would be the position of the vendee if he were to obtain actual possession of the goods. See *Sheppard v. Harrison*, L. R., 5 H. L., at 125. *Cox v. Harden*, 4 East, at 217.

(*u*) *Ogg v. Shuter*, 1 C. P. D. 47.

(*z*) *Turner v. The Trustees of the Liverpool Docks*, 6 Ex. 543; *Barrow v. Coles*, 3 Camp. 92.

(*y*) I think that when one merchant in this country sends to another under circumstances like the present a bill of lading and a bill of exchange it is not at all necessary for him to say in words we require you to take notice that our object in enclosing these bills of lading and bills of exchange is that before you use the bills of lading you shall ac-

cept the bills of exchange. Merchants know perfectly well what they mean when they express themselves not in the language of lawyers, but in the language of courteous mercantile communication; and I do not think that any merchant in England, receiving a bill of lading and a bill of exchange under these circumstances, when he came to reflect on the matter, would feel any doubt that he could not retain the one without accepting the other. Per Lord Cairns in *Sheppard v. Harrison*, L. R., 5 H. L. at 133; see also *Brandt v. Bowley*, 2 B. & Ad. 932. But see *Key v. Cotenworth*, 7 Ex. 595.

(*z*) *Gabarron v. Kreeft*, L. R., 10 Ex. 275.

plaintiff by the consignor, and that the bill of lading should be forwarded to the plaintiff as security for his advance, and the consignor shipped a parcel of goods accordingly, and drew upon the plaintiff for the price, and obtained a bill of lading from the master which he intended in due course to have forwarded to the plaintiff, but the consignor having become bankrupt, the liquidator placed the bill of lading in the hands of the defendants, with instructions not to part with it, and they refused to give it up; it was held that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it (a).

CONSTRUCTION
OF BILLS OF
LADING.

The general rules of construction applicable to mercantile documents, which have been already mentioned, with reference to charter-parties are applicable to bills of lading.

ORDINARY
EXCEPTIONS.

The contract to carry the goods safely which is contained in the ordinary bill of lading is subject to several express exceptions. It is necessary to explain the meaning of these limitations of the shipowner's responsibility. This will appear from the following cases, some of which relate, however, to similar exceptions in contracts of charter-party. It is a general rule in construing these exceptions that the intention of the parties as expressed on the contract is to be looked to, for no exception (of a private nature, at least) which is not contained in the contract itself, or arising by implication of law, can be engrafted on it as an excuse for its non-performance (b).

Act of God
and the
Queen's ene-
mies.

The first words of the ordinary exception are, "*the act of God and the Queen's enemies*." This is only the expression of a limitation of liability which existed at common law in the case of all common carriers (c). The meaning of the first part of this exception is shown by the construction which has been put upon the common law limitation of the carrier's responsibility. Acts that could not happen by the intervention of man, such as storms, tempests and the like, are *acts of God* within its meaning (d). For instance, a loss caused by a sudden

(a) *Lutscher v. The Comptoir d'Es-compte de Paris*, 1 Q. B. D. 709.

(b) See the judgment of Lord Ellenborough in *Atkinson v. Ritchie*, 10 East, 533, and *Spence v. Chodwick*, 10 Q. B. 517, and *supra*, p. 322.

(c) *Coggs v. Bernard*, 2 Ld. Raym.

909; *Dale v. Hall*, 1 Wils. 281; *The Proprietors of the Trent Navigation v. Wood*, 3 Esp. 127; *Laveroni v. Drury*, 8 Exch. 166.

(d) See the judgment of Lord Mansfield in *Forward v. Pittard*, 1 T. R. 33. See also *ante*, p. 77, note (b).

gust of wind is covered by these words (*e*); but not a loss by fire, which, although caused by no negligence on the part of the carrier, yet was not occasioned by lightning (*f*). And in a case, in which goods had been placed in a boat which was towed by a steamer, and the steamer stopped in the ordinary course pursued on the voyage, and the tide thereupon forced the boat against the steamer, so as to cause a leak, through which the goods were damaged, it was considered by the Court of Exchequer that the injury did not arise from the "act of God" (*g*). The words "*the Queen's enemies*" relate, not to robbers—for the consequences of whose attacks carriers are liable, unless their liability has been varied by statute, or express contract—but in the case of an English ship, and in other cases, to the enemies of the Sovereign of the shipowner (*h*).

Another exception which sometimes occurs in bills of lading, but more usually in charter-parties, is the "*restraint of princes and rulers*" (*i*). Restraint of
princes.

Where by a charter-party the master was bound to proceed to St. Petersburg, and there to load from the freighter's factor a complete cargo, and the charter-party contained the usual exception of "restraint of princes and rulers during the voyage," it was held that these words did not justify the master after taking in at St. Petersburg about half a cargo, in sailing away upon a mere rumour of a hostile embargo, and that if this provision applied at all as an excuse for not loading a cargo, it meant an actual and operative restraint; and, therefore, that the master was liable to the freighter, although his not having loaded

(*e*) See also *Nugent v. Smith*, 1 C. P. D. 19, 423, where the meaning of the phrase act of God is fully discussed; and *Nichols v. Marsland*, 2 Ex. D. 1; *Amies v. Stevens*, 1 Str. 128; *Oakley v. The Portsmouth and Ryde Steam Packet Company*, 11 Exch. 618, and *ante*, p. 77.

(*f*) *Forcard v. Pittard*, 1 T. R. 27. This case shows the nature of the losses which are within the exception. In cases of fire, there is, in addition to the express exception in the bill of lading, a particular statutory protection. See *ante*, pp. 79, 80.

(*g*) *Oakley v. The Portsmouth and Ryde Steam Packet Company*, *ubi supra*.

(*h*) *Russell v. Niemann*, 17 C. B., N. S. 163; *The Heinrich*, 3 L. R., A. & E. 436; *The Teutonia*, L. R., 4 P. C. 171. It would seem that these words do not

include *pirates*. See *Molloy*, B. 1, c. 4, s. 3. The question is, however, practically unimportant, as most bills of lading and charter-parties contain an express exception of loss by pirates or robbers by sea; and it has been held, that such a loss is covered by the exception of *perils of the seas*. See 2 Roll. Abr. 248, pl. 10. As to the construction of the word *pirates*, in a policy of insurance, see *post*, Chap. VII., INSURANCE, Part I.

(*i*) As to the meaning in a policy of insurance of a warranty of freedom "from all consequences of hostilities, riots or commotions," see *Ionides v. The Universal Marine Insurance Company*, 14 C. B., N. S. 259, and *post*, Chap. VII., INSURANCE, Part II.

a complete cargo proceeded from a *bonâ fide* and well-grounded apprehension that if he waited any longer an embargo would be laid upon the ship (*k*). In more recent cases it has been held that an apprehension of capture by the enemies of his country, founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, will justify delay in the prosecution of a voyage (*l*).

Where the plaintiff and defendant agreed by charter-party that the defendant's vessel, a British ship, should, with all convenient speed load, and being so loaded should, as soon as weather would permit, proceed to Hamburg, and there deliver her cargo, *the restraints of princes and rulers excepted*, and it appeared that before any breach of the charter-party, war broke out between France and Germany, and Hamburg was blockaded by the French fleet, and that the charter-party could not be carried out within a reasonable time, without running the blockade, and that the shipowner refused to carry out the charter; it was held that no action would lie against the shipowner for breach of charter; for that the object of each of the parties was the carrying out of a commercial speculation within a reasonable time, and if the restraint of princes intervened so long as to make this impossible, each had a right to treat the contract as at an end. But the Court rested the decision upon the circumstance that the contract was altogether executory, and intimated that different considerations would have applied if the cargo had been on board at the time the blockade commenced (*m*).

In a case in which a charter-party contained the words "restraint of princes, &c. during the said voyage," it was held that the exception did not apply at the loading port, but only during the voyage (*n*). In a later case, however, which was in fact distinguishable from the previous decision, the restraint of the vessel having occurred at a port abroad at which the ship might be considered to be already on her voyage, the Court of Exchequer dissented from this view (*o*).

(*k*) *Atkinson v. Ritchie*, 10 East, 530; *Spence v. Chodwick*, 10 Q. B. 517. See also *Pole v. Cetovich*, 9 C. B., N. S. 430; *Ogden v. Graham*, 1 B. & S. 773; and *Aubert v. Gray*, 3 B. & S. 163.

(*l*) *The San Roman*, L. R., 5 P. C. 301; *The Heinrich*, L. R., 3 A. & E., at p. 435.

(*m*) *Geipel v. Smith*, L. R., 7 Q. B. 404; see also *Rodonachi v. Elliott*, L. R.,

9 C. P. 518.

(*n*) *Crow v. Falk*, 8 Q. B. 467.

(*o*) *Bruce v. Nicolopulo*, 11 Exch. 129. See, however, *Valante v. Gibbs*, 6 C. B., N. S. 270. In this case Cockburn, C. J., stated that he was not disposed to dissent from *Crow v. Falk*. See *Steel v. The State Line Steamship Company*, 3 App. Ca. 72; and see *Barker v. McAndrew*, 34 L. J., C. P. 191.

Where the defendants undertook to convey some boxes of gold dust from the coast of the Pacific across the Isthmus of Panama to London, "the act of God, the Queen's enemies, robbers, fire, accidents from machinery, boilers, steam, dangers of the sea, roads, and rivers, of whatsoever nature or kind, excepted," the Court held that the word "robbers," looking at the other words with which it was associated, and to the nature of the transit, meant robbers by force, and that it did not protect the defendants from liability for the loss of one of the boxes which was stolen from a railway truck between Southampton and London. The Court said that the words "dangers of roads" might be explained by the context to refer to marine roads where vessels lie at anchor, but that even supposing them to extend to roads on land, they could apply to such dangers only as were immediately caused by the condition of the roads; such, for instance, as the overturning of carriages (*p*).

Robbers and dangers of the roads.

In a case where goods had been stolen during a voyage, or after the ship's arrival in port, and the bill of lading contained exceptions, including pirates, robbers, thieves, barratry of master and mariners, it was held that the word "thieves" applied only to thieves external to the ship, and that in the absence of evidence that the goods had been stolen by the crew, the shipowner could not rely upon the exception of barratry (*q*).

Thieves.

Damage to goods arising from a collision caused by the negligent navigation of the master does not amount to barratry (*r*).

Barratry.

Where the ship is so damaged as to be unable to proceed, but the goods are not injured, the exception, "the dangers and accidents of the seas and navigation" does not justify the master in selling the goods (*s*). Where a ship arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo, and whilst she was being unloaded, and after the discharge of all the crew, except the mate, she fell over, owing to the breaking of some tackle by which she had been fastened to a loaded lighter lying outside of her, and the water got in and damaged the goods still on

Dangers of the seas and navigation.

(*p*) *De Rothschild v. The Royal Mail Steam Packet Company*, 7 Exch. 734.

(*q*) *Taylor v. The Liverpool and G. W. Steam Company*, L. R., 9 Q. B. 546. In this case the judges seemed to doubt whether theft by the crew would be

"barratry," within the meaning of the exception.

(*r*) *Grill v. General Iron Screw Collier Company*, L. R., 3 C. P. 476.

(*s*) *Cannan v. Meaburn*, 1 Bing. 243, 465.

board, this was held to be a loss within the exception in the bill of lading of "all and every the dangers and accidents of the seas and navigation;" and it was held in the same case (the injury, it will be observed, having happened by reason of one of the excepted perils), that the jury were properly directed that, under the circumstances, the shipowners were only bound to take the same care of the goods as a person would of his own goods, that is to say, ordinary and reasonable care (*t*). This exception in a charter-party does not extend to a merely temporary impediment to the completion of the voyage, such as an inability to enter port for want of sufficient water; and consequently the shipowner is liable for the non-completion of the voyage under these circumstances, even although it would not have been safe for the ship to remain outside the port, until the period of the year at which the water would be sufficient (*u*); nor does such an exception excuse the charterer for not loading the vessel, although, owing to sea perils, the ship did not arrive at the port of loading until the season for loading in that particular trade was over, the proximate cause of the impossibility of loading being, in this case, not the dangers of the navigation, but the fact that the season was over when the ship arrived (*x*).

Where the exception in the bill of lading was, "the act of God, &c., and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, *save risk of boats so far as ships are liable thereto*, excepted," and the goods were sent towards the shore in one of the ship's boats, and lost owing to the boat being driven on shore by the violence of the wind and sea, the shipowner was held not to be liable; for the Court considered that the words narrowing the exception meant that the owner's liability was to be retained only in respect of risks for which he would have been liable if they had occurred when the goods were on board the ship (*y*). Where the same exception was contained in a charter-party by which the shipowner contracted to carry goods safely to London,

(*t*) *Laurie v. Douglas*, 15 M. & W. 746. Unfortunately the particulars of the judgment in this case are not reported. See *ante*, p. 77 n. (*b*). Where a charter contains an exception of sea perils, and the ship sails in a seaworthy state, and is damaged in the course of the voyage by perils of the sea, the owner is not bound to repair; but if he

does not choose to repair he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo. *He ought either to repair or stop*. See *per* Parke, B., in *Worms v. Story*, 11 Exch. 430.

(*u*) *Schilizzi v. Derry*, 4 E. & B. 872.

(*x*) *Hurst v. Osborne*, 18 C. B. 144.

(*y*) *Johnston v. Benson*, 4 Moore, 90.

and they were, upon suspicion of their being contraband, taken out of the ship at Cadiz, against the will and without the default of the shipowner, by custom house officers acting according to the law of Spain, and were afterwards confiscated, the shipowner was held to be liable (z).

Numerous cases which have arisen upon the construction of policies of insurance have also put a meaning upon the expression "perils of the sea" (a). It is not necessary to refer to them at length in the present place, as they will be found collected in a later Chapter (b). It will be sufficient here to state that the following losses have been held to be covered by this expression:—a loss by pirates (c); by accidental collision (d); by the swell of the tide in a dry harbour (e); by the wilful but not barratrous act of the crew in throwing the ballast overboard (f); and by a stranding rendered necessary by leakage produced by the careless loading of the cargo (g).

But every loss that occurs on the sea is not a loss by its perils: for instance, losses caused by the injuries of worms at sea (h), or by another vessel firing on the ship by mistake (i), or by injury to the goods on the voyage by rats (k), or damage arising from the want of ventilation arising in part from the necessity of keeping the hatches closed during bad weather (l),

(c) *Spence v. Chodwick*, 10 Q. B. 517; see also *Gosling v. Higgins*, 1 Camp. 451, where the goods were improperly seized by custom house officers; and *Evans v. Hutton*, 4 M. & Gr. 954.

(a) But although the cases decided on the meaning of perils of the seas in policies of assurance have an important bearing upon the meaning of similar words in the exceptions in a bill of lading, it is to be remembered that the same rules of construction have not always been applied to the two classes of documents. On this point, see *Lloyd v. The General Iron Screw Collier Company*, 3 H. & C. 284; 33 L. J., Ex. 269; *The Freedom*, L. R., 3 P. C. at p. 601; *The Chasca*, L. R., 4 A. & E. 446.

(b) *Post*, Chap. VII., INSURANCE.

(c) *Pickering v. Barklay*, 2 Roll. Ab. 248.

(d) *Barton v. Wallingford*, Comb. 57; *Buller v. Fisher*, Abbott on Ship. 386. See also *Hagedorn v. Whitmore*, 1 Stark. 157.

(e) *Fletcher v. Inglis*, 2 B. & A. 315. This case appears to have been decided on the ground that the swell was extraordinary and accidental. See the

judgment in *Magnus v. Buttemer*, 11 C. B. 876; and *Corcoran v. Gurney*, 1 E. & B. 466.

(f) *Dixon v. Sadler*, 5 M. & W. 405; *S. C.*, 1 M. & W. 895. Where damage was done to the cargo by sea water let into the hold in consequence of the barratrous act of the crew in boring holes in the ship for the purpose of scuttling her, this was held not to be within the exception. *The Chasca*, L. R., 4 A. & E. 446.

(g) *Redman v. Wilson*, 14 M. & W. 476. So damage occasioned by water coming into the ship in harbour through the discharge pipe in consequence of the valve being left open by the negligence of the crew, is a loss by perils of the sea within a marine policy. *Davidson v. Burnand*, L. R., 4 C. P. 117. See also *Good v. The London Steamship Owners' Mutual P. Association*, L. R., 6 C. P. 563.

(h) *Rohl v. Parr*, 1 Esp. 445.

(i) *Cullen v. Butler*, 5 M. & S. 461.

(k) *Laveroni v. Drury*, 8 Exch. 166; *Kay v. Wheeler*, L. R., 2 C. P. 302; and *ante*, p. 77 (b).

(l) *The Freedom*, L. R., 3 P. C. 594.

do not fall within this exception. And losses which have occurred when a vessel has been under repair on a beach, or by reason of an alteration by natural causes in the banks of a navigable river, or by the rising and falling of a vessel with the tide whilst moored in harbour in the ordinary course of her voyage, have also been held not to fall within the description of losses by sea perils (*m*).

A loss arising from collision caused by the negligence of the master and crew of the ship is not within the exception accidents or damage of the sea (*n*).

Not accountable for leakage.

"Not accountable for leakage" is frequently inserted in bills of lading, and in such case the owners are not answerable for loss by leakage, unless it is proved that the leakage was caused by the negligence of the master and crew (*o*).

Where bales of palm baskets and barrels of oil were shipped under a bill of lading, containing the words "not accountable for rust, leakage or breakage," and during the voyage some of the oil escaped from the barrels and damaged the palm baskets; it was held that the word "leakage" was intended to protect the shipowner from liability to compensate the owner of the goods for waste caused by leakage, and did not operate to exempt the shipowner from liability to pay for the damage caused to the palm baskets (*p*).

A bill of lading contained, in addition to a long list of excepted risks, whether arising from negligence or otherwise, the following words: "No damage (*q*) that can be insured against

(*m*) *Thompson v. Whitmore*, 3 Taunt. 227; *Smith v. Shepherd*, Abbott on Ship. 383; *Magnus v. Buttemer*, 11 C. B. 876.

(*n*) *Grill v. The General Iron Screw Collier Company, Limited*, L. R., 3 C. P. 476; *Lloyd v. The General Iron Screw Collier Company, Limited*, 3 H. & C. 284; 33 L. J., Ex. 269.

(*o*) *The Helene*, Br. & L. 429; *Philips v. Clark*, 2 C. B., N. S.

(*p*) *Thrifty v. Toulk*, 2 C. P. D. 432. So in *Czech v. The General Steam Navigation Company*, L. R., 3 C. P. 15, where the bill of lading contained the words "The said goods to be free of breakage, leakage and damage," it was held that the shipowner was liable for damage done to goods on board the ship during the voyage by oil, which, by the negligence of the crew, was allowed to penetrate from the engines

to the place where the goods were stowed. See *The Nepoter*, L. R., 2 A. & E. 375.

(*q*) Damage will include damage amounting to a total loss of goods, but does not apply to the case of the abstraction of the goods. *Taylor v. The Liverpool and G. W. Steam Company*, L. R., 9 Q. B. 546. See also *Hotham v. East India Company*, 1 Dougl. 272, where a provision in the charter-party, that the shipowners were only to be liable in respect of "ship damage" to the goods, was held to mean, not that they were to be answerable for damages occasioned by acts of God, such as storms, but for those only which were caused by their own fault, or that of their servants, or which arose from defects in the ship, improper stowage, or the like.

will be paid for, nor will any claim be admitted unless made before the goods are removed ;” and it was held that though the first clause was limited to insurable damage only, the second clause applied to all damage, whether apparent or not, which could, on an examination of the goods conducted with proper care and skill at the place of removal, have been discovered (*r*).

The ordinary operations of nature cannot be regarded as accidents. Thus, in a case where the merchant agreed to load the plaintiff's ship, in regular and customary turn, except in the case of riots, strikes or any other accidents beyond his control, which might prevent or delay her loading : it was held that the merchant was liable for the delay, notwithstanding that it was caused by a snow storm (*s*).

Even when the loss is occasioned by a cause within any one of the excepted perils, the shipowner may be often liable if there is negligence on his part ; as, for instance, if the ship was unseaworthy, for in such cases there would be no remedy against the underwriters, and unless the shipowner were liable, the contract of carriage, taken together with the contract of insurance, would not afford a complete indemnity to the owner of the goods (*t*). And it is clear that the shipowner is liable if the damage to the goods is caused by his negligence, although there have been negligence on the part of the shipper, if the negligence of the shipowner is the *causa proxima* of the loss. This rule was acted upon in a case, in which a merchant caused to be shipped some casks of sulphuric acid, as well as some cambric goods, without giving notice to the shipowner that the casks contained acid ; and, owing to the casks being placed in proximity with the other goods, and the acid leaking, the cambric was damaged (*u*).

Exceptions contained in a bill of lading, such as “accidents

(*r*) *Moore v. Harris*, 1 App. Ca. 318. The actual decision does not appear to go further than the proposition above stated, because the Court arrived at the conclusion that the damage might have been discovered ; but the reasoning of the judgment seems to support the proposition that the exception would protect the shipowner even against latent damage.

(*s*) *Fenwick v. Schmalz*, L. R., 3 C. P. 313.

(*t*) *Phillips v. Clark*, 2 C. B., N. S. 156.

(*u*) *Alston v. Herring*, 11 Exch. 822. The Court assumed in this case that the shipowner had been guilty of negligence in stowing the acid in proximity to the other goods, but the plea expressly alleged that there had been no neglect on the part of the shipowner in this respect, and it is difficult to see that there was in fact any neglect, seeing that he was ignorant, owing to the wrongful act of the goods owner, of the nature of the contents of the casks.

Accidents.

Effect of exceptions in case of negligence.

or damage of the seas, rivers and steam navigation of whatever nature or kind soever;" "not accountable for leakage or breakage," do not protect the shipowner from any of the consequences arising from his negligence (*x*). But the shipowner may, if he uses apt words, protect himself from the negligence of his servants. Thus in a case where the bill of lading contained a clause exempting the owners of the ship from liability to make good loss from "negligence or default of master or mariners or others performing their duties:" it was held that the shipowners were protected from liability, to make good damage to goods caused in the course of the voyage by reason of the careless stowage of the goods by the master and crew (*y*).

Many of the large steamship companies give bills of lading in a form which protects them from the consequences of damage or loss, however it may be occasioned, whether by the negligence of their servants or otherwise (*z*). When, however, the words used protect the shipowner from the negligence of his captain, officers or crew only in the transmission of the goods, he remains liable for the consequences of negligent stowage (*a*).

PROVISIONS OF
STATUTES RE-
LATING TO
CARRIAGE OF
GOODS BY
RAILWAY COM-
PANIES AT SEA.

The Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31, extends the Railway and Canal Traffic Act, 1854, to steam vessels employed by a railway company, and the Railways Regulation Act, 1871 (34 & 35 Vict. c. 119), s. 12, enacts that where a company by through booking contracts to carry any animals, luggage, or goods from place to place partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage or goods by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the

(*x*) *Lloyd v. The General Iron Screw Collier Company*, 33 L. J., Ex. 269; *Philipps v. Clark*, 2 C. B., N. S. 156; *Lewin v. Dudgeon*, L. R., 3 C. P. 17 (*n.*); *The Peninsula and Oriental Steam Navigation Company v. Shand*, 3 Moore, P. C. C. 272. But see *Good v. The London Steam Owners' Association*, L. R.,

6 C. P. 563.

(*y*) *The Duero*, L. R., 2 A. & E. 393; *Steel v. The State Line Steamship Company*, 3 App. Ca. 72.

(*z*) See *Steel v. State Line Steamship Company*, 3 App. Ca. 72.

(*a*) *Hayn v. Culleford*, 4 C. P. D. 182.

receipt or freight note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods and the company in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such conditions (*d*).

It is the duty of the master to deliver the goods to the consignee or holder of the bill of lading on payment of freight (*e*). The delivery of the goods and the payment of freight are acts which should be performed concurrently (*f*).

DELIVERY OF
GOODS.

The master, as a matter of courtesy, commonly gives notice of the ship's arrival to the consignee, but, in the absence of express provisions in the charter-party or bill of lading, he is not bound to do so (*g*).

Where, as is commonly the case, several sets of bills of lading are given, questions of considerable difficulty sometimes arise from different sets of the same bills of lading getting into the hands of rival claimants. There is no doubt that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of several bills, acquires the property in the goods; and all subsequent dealings with the other bills must in law be subordinate to the first one; and it is by no means clear that in such a case a shipowner who, without notice of the first dealing with the bill of lading, has delivered the goods on presentation of another part of the bill of lading to another person, has in law any defence to an action by the person who, by virtue of the first dealing with the bill of lading has acquired the right to the goods (*h*). Wherever the master has any notice of conflicting claims, it is his duty to interplead (*i*).

Holders of
different sets
of bills of
lading.

(*d*) See *Cohen v. The South Eastern Railway Company*, 2 Ex. Div. 253; *Doolan v. The Midland Railway Company*, 2 App. Ca. 792.

(*e*) The shipowner's duty is to deliver to the consignee, and if the consignee is ready to accept the goods the shipowner is not justified in landing the goods at a wharf of his own selection at the port of discharge. *Bourne v. Gatliffe*, 7 M. & G. 850.

(*f*) See *supra*, p. 153, note (*g*). When a bill of lading has been given the master may refuse to deliver, except upon production of the bill of lading. *Erichson v. Barkworth*, 3 H. & N. 615. See per Maule, J., *Howard v. Shepherd*, 9 C. B. at page 320. As

to the right of the master to warehouse goods, see *Mors Le Blanch v. Wilson*, L. R., 8 C. P. 227, and *post*.

(*g*) *Goodson v. Brooke*, 4 Camp. 161. See *supra*, p. 313.

(*h*) See *Barber v. Meyerstein*, L. R., 2 C. P. 538, 4 H. L. 317. See per Lord Westbury at page 336; *Glynn v. East India Dock Company*, 6 Q. B. D. 129; *The Tigress*, Br. & L. 38. In the latter case Dr. Lushington seemed to be of opinion that the words contained in the bill of lading, "the first bill of lading being accomplished the others to stand void," would operate to protect the shipowner in such a case.

(*i*) Abbott on Shipping, 3rd ed. 381, and see *post*, Chap. IV. Part II.

PARTIES TO
SUE ON CON-
TRACT OF CAR-
RIAGE.

Having mentioned the more important incidents which belong to the contract by bill of lading, it will be convenient to consider a question of very frequent occurrence in practice, namely, the question in whose name the action should be brought for any breach of the contract for the carriage of goods.

The general rule with respect to the person who ought to sue in case of the loss of or damage to goods carried in a general ship is, that the action should be brought in the name of the person who has employed the carrier (*k*). For the right to compensation flows from the contract of carriage, and can only be enforced by the party with whom that contract was made. The application of this general rule, however, is frequently difficult, owing to intermediate agencies which intervene between the real parties to the contract, and also to the short and ambiguous terms in which these agreements are usually expressed.

Consignee
usually right
party.

The consignee is in most cases the party who ought to sue; because the consignor, in entering into the arrangement with the carrier, usually acts as agent for the consignee. It has been frequently held, that if the consignee selects or authorizes the mode of carriage, the contract entered into by the consignor with the carrier is made as agent of the consignee, and the latter is the proper person to sue. This is the rule which has been acted upon in the analogous case of carriers by land. The vendee must sue if he have directed the goods to be delivered either to a carrier generally, or to the particular carrier in question (*l*). The ownership of the goods is very material in inquiring as to the right party to sue, not because the owner of the goods ought necessarily to bring the action, but because where the property passes to the vendee by delivery to the carrier, it is in general to be inferred that the contract was made with the vendee; that is to say, that the vendor, in making the contract with the carrier, acted as the agent of the vendee (*m*). Where

Effect on this
question of
ownership of
goods.

(*k*) *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 859; *Freeman v. Birch*, 1 N. & M. 420; *S. C.*, 3 Q. B. 492, note (*a*), and the cases cited below.

(*l*) *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 582; *Coats v. Chaplin*, 3 Q. B. 483; *Dunlop v. Lambert*, 6 Cl. & F. 600. There is no doubt that the consignee, on whose account the goods are shipped, may sue the shipowner for their non-delivery. *Fragano v. Long*, 4 B. & C. 219; *Tronson v. Dent*, 8 Moo. P. C. C.

419. Where a tradesman desired goods to be sent by a particular carrier for sale on approval, it was held, that the consignor was the proper party to sue the carrier. *Swain v. Shepherd*, 1 Moo. & R. 223. See, however, *Haines v. Wood*, Bull. N. P. 36.

(*m*) This appears to be the true distinction. Some expressions occur in the earlier decisions, from which it might be inferred that, in all cases, the owner at the time of the loss ought to sue—but this obviously cannot be so. See the cases cited in the last note.

the property in the goods does not pass to the vendee in consequence of the provisions of the Statute of Frauds not having been complied with, this inference does not arise, and the vendor is the person who ought to sue (*n*).

It is, however, always important to consider the terms of the bill of lading; for, although it is said, in an early case (*o*), that if goods be consigned by bill of lading to A., he is *prima facie* the owner, and the party to sue if they are lost, but that if the bill be special to deliver to A. for the use of B., the latter should sue, this does not mean that the consignor may not sue when it appears clearly that the contract was entered into with him (in which case the ownership of the goods is immaterial), or when, the contract having been made in the ordinary way, there are no facts to show that he was acting as agent for the consignee. Therefore, where by the bill of lading the goods were to be delivered for the consignor, and in his name, to the consignee, and no question of agency could arise, the consignee having, at the time of shipment, no property in the goods, it was held that an action in the name of the latter for damage done to the goods was misconceived (*p*). And in a later case it was laid down that if there is a special contract with the consignor, on his own behalf, the ownership of the goods is immaterial (*q*). Where goods were shipped for the use, and at the risk of the consignees, and the consignor took bills of lading from the master, making them deliverable to his own order, although it was held that the property vested by the shipment in the consignee, the Court said that the master might be answerable to the consignor for having delivered them otherwise than to his order (*r*). So, where goods were shipped in the same way at the risk of the consignees, and the bills of lading provided for a delivery to the order of the consignors, it was held, not only that the consignors might sue for the non-delivery according to their orders, but that they were entitled to recover as damages

(*n*) *Coombs v. The Bristol and Exeter Railway Company*, 3 H. & N. 510.

(*o*) *Evans v. Marlett*, 1 Ld. Raym. 271; *S. C.*, 3 Salk. 290.

(*p*) *Sargent v. Morris*, 2 B. & Ald. 277; and see *Dunlop v. Lambert*, 6 Cl. & F. 600. It is to be recollected that an agent may sue on a contract made with him in his own name; *Joseph v. Knox*, 3 Camp. 320; or the real principal may sue. See the cases collected

2 Wms. Saund. 47 q, and the judgment in *Van Casteel v. Booker*, 2 Exch. 706. It may, therefore, happen, if there is an express contract with the consignor, and he acted in making it with the carrier as agent for the consignee, that either the principal or the agent may sue.

(*q*) See the judgment in *Dunlop v. Lambert*, *ubi supra*.

(*r*) *Cox v. Harden*, 4 East, 211.

the full value of the goods, as it appeared that their intention at the time of the shipment was that the property should only vest in the consignees on their accepting some bills of exchange which they did not accept (s). Whether, when goods are shipped under a bill of lading, they were delivered on board to be carried on behalf of the consignor, or of the consignee, is, as we have already seen, a question in each case for the jury to determine, having regard to the form of the bill and the surrounding facts (t).

Right to bring
action to re-
cover the
goods.

These observations must, of course, be read subject to the modifications introduced by the 18 & 19 Vict. c. 111, which, as has already been mentioned (u), places consignees named in bills of lading, and indorsees of these documents, in the same position with respect to the contract contained in the bills of lading as if it had been made with themselves; and it must be observed that the rules mentioned above with reference to the right parties to sue are only material to determine who is to sue for a breach of the contract of carriage. They have no necessary application when the inquiry is as to the right to recover the goods; for this action is not founded on contract, and must be brought in the name of the person in whom both the property and right of possession are vested at the time of the conversion complained of; that is to say, usually in the name of the indorsee of the bill of lading (v).

FREIGHT.

Thirdly; *as to the payment of freight generally, both under charter-parties and under contracts by bill of lading; and as to the shipowner's lien for freight and remedies for its recovery.*

General rules.

Freight is the reward which is payable for the carriage of goods to their destination on a legal voyage (x). In ordinary cases, it does not become payable unless the voyage is com-

(s) *Brandt v. Bowlby*, 2 B. & Ad. 932.

(t) See *supra*, p. 347.

(u) *Ante*, p. 346.

(v) *Hailo v. Smith*, 1 B. & P. 563; *Wilmshurst v. Bowker*, 7 M. & Gr. 882; *Valpy v. Gibson*, 4 C. B. 837; *Wait v. Baker*, 2 Ex. 1.

(x) See *Muller v. Gernon*, 3 Taunt. 394, where it was held, that freight was not recoverable for goods imported in time of war from an enemy's country

without a British licence: and *Blanch v. Solly*, 8 Taunt. 89, where the importation in the ship in question was in violation of a statute. As to when "freight" is to be considered as including passage-money, see *Denoan v. The Home and Colonial Assurance Company*, L. R., 7 C. P. 341; as to "back freight," see *The Cargo ex Argos*, L. R., 5 P. C. 134, and *supra*, p. 364, n. (c); and as to what is dead freight, see *Gray v. Carr*, 6 Q. B. 352, and *infra*, p. 389.

pleted, and the goods are carried to their destination and the shipowner is ready to deliver them (*y*).

Thus, where the contract was that the freight was to be paid on the right delivery of the cargo at a foreign port, and owing to a hostile occupation of this port the ship returned to England and relanded the goods, it was held, that the event upon which the freight was made payable had not happened, and that none was due (*z*). The same rule was also acted upon where the freight was made payable on the arrival and discharge of the ship at a particular port, and the voyage was wrongfully interrupted by the seizure of the ship, and she was detained, and afterwards re-delivered to the owner, who offered to complete the voyage (*a*). Where a charter-party provided that a fixed sum, which was to be considered as earned for outward freight, should be paid on delivery of an outward cargo, it was admitted that the delivery was a condition precedent although the non-delivery was caused by the seizure of the cargo, without any default of the shipowner, by persons exercising the powers of Government at the outward port where it should have been delivered (*b*).

In a case where petroleum was loaded by the defendant on board the plaintiff's ship in the port of London under a bill of lading, according to which the petroleum was to be delivered at Havre, and to be taken out by the defendant within twenty-four hours after the ship's arrival or the defendant to pay ten guineas a day demurrage; the ship arrived at Havre with the

Delivery of cargo.

Special circumstances may excuse delivery at the usual landing place in the port.

(*y*) In *Duthie v. Hilton*, L. R., 4 C. P. 139, the defendants shipped cement on the plaintiff's ship under a bill of lading by which the freight was made payable within three days after arrival of ship and before delivery of any portion of the goods. The ship arrived at her anchorage in the port of discharge with the cargo on board, but within three days she sank; she was afterwards raised, but the cement no longer existed as cement, having hardened into solid masses. It was held, that the plaintiff not being ready to deliver the cement, was not entitled to sue for the freight. Where the charter-party stipulates that a lump sum freight is to be paid on delivery of the cargo, and a portion of the cargo is lost on the voyage by no default of the shipowner, the ordinary rule is, that on the delivery of the remainder of the cargo he is entitled to sue for the lump freight without deduction; *Merchant*

Shipping Company v. Armitage, 9 L. R., Q. B. 99; *Robinson v. Knights*, 8 L. R., C. P. 466; *The Norway*, Br. & L. 377. "The safety of the ship is the mother of freight," per Lord Mansfield in *Mackrell v. Simond*, 2 Chit. 673. See also the judgment of Lord Ellenborough in *Hunter v. Prinsep*, 10 East, 394; the judgment in *De Silvale v. Kendall*, 4 M. & S. 37; and that of Maule, J., in *Crosier v. Smith*, 1 M. & Gr. 415. "Freight is the reward payable to the carrier for the safe carriage and delivery of goods: it is payable only on the safe carriage and delivery; if the goods are lost on the voyage nothing is payable; see the judgment of the Privy Council in *Kirchner v. Venus*, 12 Moo. P. C. C. 361; *Brown v. Tanner*, L. R., 3 Ch. 597.

(*z*) *Liddard v. Lopes*, 10 East, 526.

(*a*) *Smith v. Wilson*, 8 East, 437.

(*b*) *Storer v. Gordon*, 3 M. & S. 308.

petroleum on board, but the authorities of the port, there being a quantity of war material on the quay, would not allow the cargo to be landed; after some delay the petroleum was discharged into a lighter in the outer harbour, but as the defendant did not take delivery of it, the plaintiff afterwards reloaded the petroleum and carried it back to London. It was held that the plaintiff was entitled to recover the freight for the carriage of the petroleum to Havre, because although under ordinary circumstances the quay would have been the proper place to have discharged the petroleum, yet that there was no engagement to go there, at all events without regard to the existing state of things in the port, and that it was sufficient in the circumstances to entitle the plaintiff to freight that he was ready to deliver the goods from alongside to the defendant within the limits of the port (c).

**Abandonment
of voyage.**

Where the master and crew of a vessel in the course of the voyage abandoned her in a disabled condition, and she was afterwards taken possession of by salvors, who carried the vessel and her cargo into safety: it was held, that by the abandonment of the barque the contract to pay freight had been dissolved, and the owners of the barque were not allowed to bail the cargo and carry it on to its destination, or to make any claim on the proceeds of the sale of the cargo in respect of freight (d).

**FREIGHT IN
ADVANCE.**

There is, however, no doubt that freight, or more properly a compensation in respect of the agreement to carry the goods, may be made payable before the commencement of the voyage, and may in some cases be recovered although the contemplated voyage has not been performed. Thus, although in the absence of any express stipulation there is not even an inception of the right to freight until the ship has broken ground (e),

(c) *The Cargo ex Argos*, L. R., 5 P. C. 134. The plaintiff was also held entitled to charge the defendant with the carriage of the petroleum back to London, because, on the facts, it was held that the plaintiff in taking the petroleum back to London did what was best for the interest of the defendant, and saved the petroleum from loss.

(d) *The Kathleen*, L. R., 4 A. & E. 269.

(e) See the judgment in *Curling v. Young*, 1 B. & P. 636. See also *Foley v. United Fire, &c. Insurance Company*, L. R., 5 C. P. 166; *Adameon v. The New-*

castle Steam Ship Company, 4 Q. B. D. 462. It is said by Molloy that if goods are fully laden on board and the ship has broken ground, and the merchant on consideration resolves not to proceed on the adventure, the freight is due by the maritime law; freight, properly speaking, would not be recoverable in such a case by our law, but the shipowner would only have a right of action against the freighter for the damage consequential on his breach of contract. Molloy, B. 2, c. 4, s. 4.

still the receiving of the goods is a sufficient consideration for a promise to pay what is often called freight in advance, but is really money paid for taking goods on board and undertaking to carry them (f); and if the parties make a distinct contract to this effect, so that it is apparent that the prepayment is an advance of freight and not a loan, there is no implied undertaking to return the money if the voyage fails; nor can it be recovered back unless there was a distinct agreement that it should be returned (g). The question, whether the freight is to be paid in advance or not, will, of course, always depend upon the terms of the particular contract. In a case at Nisi Prius, where it appeared that London was the sailing port, and the bills of lading contained the words, "freight for the said goods being paid in London," it was held, that this expression only meant that after the performance of the voyage the freight was to be paid in London instead of at the port of discharge (h). But where a ship was lost on a voyage from London to the Cape, and the words in the bill of lading were "freight for the said goods being paid," but it appeared that the broker who freighted the ship told the owner of the goods that the freight was a certain sum per ton if paid in London, and a larger sum if paid at the Cape, and the latter preferred the contract at the lower rate, and the jury found that the meaning of the contract was, that the lesser sum, if elected, was to be paid at all events whether the ship arrived or not, and that this sum had become due on the taking of the goods

Cannot be recovered back.

(f) But see *Allison v. The Bristol Marine Insurance Company*, 1 App. Ca. 209. In that case one half the freight had been paid in advance, and part of the cargo having been lost on the voyage, only one half of the cargo was delivered at the port of discharge. It was held that the shipowner had no claim against the merchant for any freight beyond the sum which he had advanced.

(g) *Frayes v. Worms*, 19 C. B., N. S. 159; 34 L. J., C. P. 274; *Byrne v. Schiller*, L. R., 6 Ex. 319; *Watson v. Shankland*, L. R., 2 Sc. & D. 304; *Anon.* 2 Show. 283; *Blakey v. Dickson*, 2 B. & P. 321; *De Silvale v. Kendall*, 4 M. & S. 37; and see the judgment in *Mansfield v. Maitland*, 4 B. & A. 585; *Saunders v. Drew*, 3 B. & Ad. 445; *Hicks v. Shield*, 7 E. & B. 633, and the judgment of Dr. Lushington in *The Salacia*, 32 L. J., P. M. & A. 45.

Where by the charter-party freight is stipulated to be paid in advance, "subject to insurance," this does not mean that the insurance is to be a condition precedent to the recovery of freight, but merely that the insurance premium is to be deducted from the freight; *Jackson v. Isaacs*, 3 H. & N. 405.

(h) *Mashiter v. Buller*, 1 Camp. 84; see also *Clark v. Druisina*, cited in *Andrew v. Moorhouse*, 1 Marsh. 123. In *Lidgett v. Perrin*, 11 C. B., N. S. 362, where the words in the bill of lading were "freight payable here," the Court held, that it was a question for the jury to say whether, looking at all the surrounding circumstances, the contract was a contract for freight contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her.

on board, the Court held that the verdict was a proper one (k). Where it was agreed by a charter-party that a portion of the freight should be paid "on the final sailing of the vessel from the port of loading," and the ship being fully equipped for sea proceeded from the docks down a canal communicating therewith and being within the limits of the artificial port, and there grounded, it was held that no freight had become payable, the vessel never having been out of the limits of the port or at sea (l). And in another case, where a proportion of the freight was to be advanced "on the ship having sailed," and it appeared that the vessel had left the harbour and proceeded into the roads where her loss took place, with no intention of returning, but the shrouds and cables were not in a proper condition for sailing, the mate was not on board, the bills of lading were not signed, and the master had soon after left her, it was held that no freight was due (m). A similar decision was come to in a later case (n), in which the vessel had left the harbour loaded, and in a fit state for sailing and with the captain on board, but the clearances not being completed or the bills of lading signed, he afterwards left her and returned to shore.

It is important to recollect, that it by no means follows because a sum of money is called "freight in advance," that the legal incidents belonging to freight will attach to it. Thus,

(k) *Andrew v. Moorhouse*, as reported 5 Taunt. 435, and *Kirchner v. Venus*, 12 Moo. P. C. C. 361. In *Byrne v. Schiller*, L. R., 6 Ex. 319, the plaintiff chartered a vessel to the defendant for a homeward voyage from Calcutta, with an option to the defendant to send the vessel on an intermediate voyage at a freight therein mentioned, 1,200*l.* to be advanced by the freighter's agent at Calcutta and the remainder on right delivery at port of discharge. The charter-party provided that the master was to sign bills of lading at any rate of freight, but not under chartered rates, except the difference be paid in cash. The vessel was sent on an intermediate voyage, and the master was required to sign bills of lading under chartered rates, but the defendant induced him to postpone the payment of the difference. The ship was lost on her way out to sea. It was held, that the plaintiff was entitled to retain the 1,200*l.*, and to recover for the difference. In *Carr v. The Wal-lachian Petroleum Company*, L. R., 1 C. P. 636; 2 C. P. 468, where the

defendants guaranteed a sum of 900*l.* gross freight home, the defendants shipped cargo which fell short of the guaranteed amount, and it was held that their guarantee was broken at the moment of the completion of the shipment, and that the circumstance that the vessel was lost on the homeward voyage afforded no answer to an action by the shipowner for breach of the guarantee.

(l) *Roelandts v. Harrison*, 9 Exch. 444.

(m) *Thompson v. Gillespy*, 5 E. & B. 209. In the same case the charter provided that the ship "being tight, strong, &c." should sail, and it was held that the seaworthiness of the ship at the time of sailing was the condition upon which the merchant had agreed to pay freight in advance, and that a plea which alleged that the ship was not at the commencement of the voyage seaworthy was a good answer to the claim of the shipowner for the freight agreed to be paid in advance.

(n) *Hudson v. Bilton*, 6 E. & B. 565.

where it was agreed that money should be paid at the port of shipment, in respect of the carriage of goods, "the ship lost or not lost," it was held that this sum did not acquire the legal incidents of freight, and that the shipowner had, in the absence of express contract, no right of lien on the goods in respect of it (o).

It sometimes happens that a ship is loaded with the owner's own goods, and in such cases no freight, or only a nominal freight, may be payable. Yet if owners' goods are shipped under bills of lading which stipulate for the payment of freight, and the freight is assigned to one person as security for advances, and the bills of lading are indorsed over to another person, the assignee of the freight is entitled to demand payment thereof from the indorsee of the bill of lading (p).

Where the ship is loaded with the owner's own goods.

Where a part only of the voyage has been performed, freight is in some cases recoverable for that portion *pro rata itineris peracti*.

Freight pro rata.

(o) *Kirchner v. Venus*, 12 Moo. P. C. C. 361. See also *post*, p. 394. And see *Ex parte Nyholm, In re Child*, 43 L. J., Bkptcy. 21, where it being provided by the charter-party that freight should be paid on signing bills of lading, &c., it was held that even assuming that the events had occurred upon which the advance freight was agreed to be paid, yet, that as the ship had not sailed on the voyage, no lien could exist on the cargo in respect of the advance freight.

(p) *Wegulin v. Cellier*, L. R., 6 H. L. 286. See also *Keith v. Burrows*, 2 App. Ca. 636. In the latter case a cargo was laden on owner's account, under a bill of lading, which made the goods deliverable at a mere nominal rate of freight. During the voyage the cargo was sold, and in the contract of sale it was stipulated that freight should be computed at 55s. per ton. When the vessel arrived mortgagees took possession of the ship and claimed to be entitled to freight at the rate of 55s. per ton. But it was held by the House of Lords that their claim could not be sustained, that the purchaser of the cargo, who was the holder of the bill of lading, was entitled to the delivery of the cargo, on payment of the bill of lading freight, and that the sum of 55s. was not freight, but was really

part of the purchase-money of the cargo. In *Swan v. Barber*, 5 Ex. D. 130, cargo was loaded on ship's account at a nominal rate of freight, and whilst the cargo was afloat the shipowner sold the cargo on terms that the freight should be at the rate of 60s. It was held that the shipowner had a lien upon the goods as unpaid vendor for the 60s., and that a contract by the purchaser might be implied to pay freight at the rate of 60s. See also *Gumm v. Tyrie*, 6 B. & E. 298.

The master cannot make freight payable to any person other than his owners (*Reynolds v. Jex*, 34 L. J., Q. B. 251), and he cannot bind his owners by a contract to carry freight free without the express authority of his owners. But, where the master has express authority to ship goods freight free on owners' account, that authority is not determined by a change of ownership, of which he has no notice (*The Mercantile and Exchange Bank v. Gladstone*, L. R., 3 Ex. 233); nor can the charterer insist on his signing bills of lading expressing a lower rate of freight than that mentioned in the charter-party. See *Grant v. Norway*, 10 C. B. 687; *Hyde v. Willis*, 3 Camp. 202; and *Pickernell v. Jauberry*, 3 F. & F. 217, and *supra*, pp. 319, 343.

The ancient rule of the maritime law was, that if the goods were received at an intermediate port by the merchant, and the noncompletion of the voyage proceeded from no fault of the master, freight *pro rata* was payable (*q*). This rule, however, whatever may have been the practice abroad, was never adopted into our law, although in the earlier cases there are ambiguous expressions on this point. The rule recognized in England is this: If the original contract has not been performed, no claim can arise under it; but if there is a voluntary acceptance of the goods at a point short of their destination, in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with, a new contract will be implied to pay compensation commensurate with the benefit actually received; that is to say, to pay freight for that portion of the voyage which has actually been performed (*r*).

Thus, in an early case (*s*), where upon a voyage from New-

(*q*) See the judgment of Lord Mansfield in *Luke v. Lyde*, 2 Burr. 889. This subject is referred to in the laws of Oleron, Art. 4, the laws of Wisby, Art. 40, and in the Consolato, Chapters 36, 37 and 39, and also in the Rhodian law, Art. 42, but no distinct general rule on this question can be gathered from the ancient systems of maritime law. The terms of these laws are obscure, and they relate usually either to cases in which the merchant receded from his contract and required his goods to be re-delivered to him, or to cases (probably not uncommon in times when the merchants frequently accompanied their goods on the voyage) in which the master refused to allow the merchant to retake the possession of the goods on the happening of any disaster to the ship. By the Roman law freight was not allowed where the completion of the voyage was prevented by sea perils. See 1 Pardessus Lois Marit. 66, 110, 325; see also *The Hiram*, 3 Rob. 180, and the note to this case at p. 184. And for the mode in which the matter is dealt with by the Commercial Codes of France, Italy, Spain, the Netherlands, Prussia, Russia and Germany, see the references made by Cockburn, C. J., in *Metcalf v. The Britannia Ironworks Company*, 1 Q. B. D. 627.

(*r*) See the judgment of Parke, B., in *Vlierboom v. Chapman*, 13 M. & W. 238; *Mulloy v. Backer*, 5 East, 316; see also the judgment in *Hunter v. Prinsep*, 10 East, 378, and the cases cited below.

See also *The Sablonsten*, L. R., 1 A. & E. 293; *The Cargo ex Galam*, Br. & L. 167. The propositions affirmed by Dr. Lushington in the latter case were:—

First, that upon the vessel becoming disabled at an intermediate port the master is allowed a reasonable time within which to re-ship or tranship so as to earn his freight.

Second, that the whole freight is payable, if, by default of the owner of cargo, the master is prevented from forwarding the cargo from the intermediate port to its destination.

Third, that no freight is payable if the owner of cargo, against his will, is compelled to take the cargo at an intermediate port.

Fourth, that to justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods by their owner at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with.

If the cargo is damaged at an intermediate port (even by one of the excepted perils), the owner of it is entitled to have it delivered to him on payment of *pro rata* freight, and the ship is not entitled to carry it in a perishing condition to the port of destination, merely to earn the whole freight. *The Grati-tudine*, 3 Rob. 240, 259; *Vlierboom v. Chapman*, *ubi sup.*; and *per curiam*, in *Notara v. Henderson*, L. R., 5 Q. B. 356.

(*s*) *Luke v. Lyde*, 2 Burr. 889.

foundland to Lisbon, the ship was captured after sailing fourteen days, within four days' sail of that port, and shortly afterwards recaptured and brought into a port in Devonshire, where the shipowners abandoned her to the insurers, and as there was no beneficial market for the goods in England, the owners of the cargo sent it to Bilboa, where it was sold for a price less than might have been obtained if the original voyage had been completed, it was held that the loss of the market was immaterial, and that the goods having been accepted, a rateable proportion of the freight was payable. The facts upon which the Court gave judgment in this case were stated in the form of a special case, and it did not appear that the shipowners ever offered to carry the goods on to Lisbon, or that they were asked to do so. It may be doubted whether the same decision would now be arrived at upon similar facts. Upon the same principle where a ship was freighted to Hamburg, and was prevented by restraints of princes from arriving there, and the consignees directed the master to deliver the cargo at Gluckstadt, and accepted a portion of it there, it was held that they were liable to pay freight *pro rata* for the goods which they had accepted (t). In an earlier case in the House of Lords (u), where the goods were to have been delivered at Glasgow, and the ship having been lost within a short distance of that port, the owners of some of the goods abandoned them to the insurers, who took possession of that part of the cargo, and conveyed it to Bristol (although the master provided another ship, and offered to carry it on to Glasgow), it was held that the whole freight was payable. Freight *pro rata* was also decreed as to another portion of the goods which the master declined to carry on to Glasgow, and which the agents of the owners of the goods took possession of, and sent on there by another ship.

In order to give a right to freight *pro rata*, the voyage must have commenced. Thus, where the ship was captured before she broke ground, it was held that no claim of this kind could arise, although the shipowners had incurred a great expense in loading the cargo (x).

Voyage must have commenced.

It is important to recollect also, that in order that the acceptance of the goods may be relied on as evidence of a new contract,

Circumstances to raise inference

(t) *Christy v. Row*, 1 Taunt. 300.

(u) *Lutwidge v. Grey*, cited in *Luke v. Lyde*, 2 Burr. 889; and more fully in

M.P.

Abbott on Shipping. She also *The Cargo ex Galam*, ante, p. 368, note (r).

(x) *Curling v. Long*, 1 B. & F. 639.

that further carriage has been dispensed with.

it must appear that it took place under circumstances from which it may reasonably be inferred that the further carriage was dispensed with. Thus it was held, that no claim to freight *pro rata* existed where the master, before the completion of the voyage brought the ship back, because there was a danger of her being confiscated at the port of discharge, and landed the cargo, and afterwards legal proceedings having been taken by the owners of it to prevent him from selling it, it was by consent delivered into their hands without prejudice to the rights of the parties (y). In another case the goods were to be carried from Shields to Lisbon, and the freight was by the terms of the charter-party to be paid on a right delivery of the cargo; the ship sailed from Shields to Portsmouth, where she joined convoy, and after sailing from Portsmouth and being detained nearly a month by contrary winds, was recalled by the convoy, owing to the hostile occupation of the port of delivery; she then returned to Portsmouth, where the cargo was sold by consent of all parties without prejudice to their rights, after an application had been made to the shippers to accept the cargo, accompanied by a notice that the shipowners reserved their right to proceed for the freight, to which the former replied that they did not consent to the goods being landed if they were to be called upon for the freight. It was held, upon these facts, that no claim for freight *pro rata* could be sustained (z). Where the goods were to be delivered in London, and the freight was by the charter-party to be paid on a right delivery of the cargo, and the ship after capture and recapture was wrecked at St. Kitts, where the cargo was sold by the Vice-Admiralty Court on the application of the master, who acted *bonâ fide*, but without instructions from any of the parties, it was held, that the sale was tortious and unauthorized, and that no freight could be recovered (a).

Claim can only be sustained in respect of carriage by shipowner.

The carriage of the goods, as far as it actually takes place, must also be the act of the shipowners, in order to entitle them to freight *pro rata*. A ship being chartered from London to

(y) *Osgood v. Groning*, 2 Camp. 466.

(z) *Liddiard v. Lopes*, 10 East, 526.

(a) *Hunter v. Prinsep*, 10 East, 378.

The Court distinguished the case on this ground from *Baillie v. Moudigliani*, Park on Insur. 90, in which a ship and cargo having been condemned and sold by a French Court of competent jurisdiction, and this sentence having been

afterwards reversed, it was held that freight *pro rata* was due, as the shipowners had been prevented from carrying the goods to the delivery port by no fault of their own, but only by the act of the foreign Court in ordering a sale pending the suit. See also *The Louisa*, 1 Dods. 319.

Buenos Ayres and to return with a cargo to a port between Gibraltar and Antwerp, the freight was to be paid in a gross sum on the delivery of the homeward cargo. The ship proceeded to Buenos Ayres and loaded goods on board, and then sailed for Gibraltar, but on her way she was obliged by sea perils to put into Fayal, where about one-third of the cargo was disposed of, partly on account of the goods having been rendered worthless by sea damage, and partly in order to defray necessary expenses. The remainder was left there by the master, who returned to England, leaving instructions with the Vice-Consul at Fayal to forward it to Gibraltar, but without giving him any authority on the shipowner's behalf to contract for the hire of a vessel. The Vice-Consul thereupon chartered a vessel *on behalf of the owners of the cargo*, which carried the remainder of the cargo to Gibraltar and delivered it there on payment of freight. It was held, under these circumstances, that the carriage to the port of destination could not be said to be done by the shipowners, and that the charter-party freight was not payable; and also that no freight *pro rata* could be claimed in respect of the carriage from Fayal to Gibraltar, as this was not the act of the shipowners, but that a reasonable freight was due to them for the carriage from Buenos Ayres to Fayal from which the shippers had derived benefit, and after which they had, in fact, accepted the goods at Fayal, by their agent the Vice-Consul, in order to forward them on to Gibraltar (b).

Even where a sale by the master at an intermediate port is justifiable and favourable to the charterer, it does not follow that he is liable to pay freight *pro rata*. Thus, where a ship having met with sea damage, the master put into an intermediate port, and, under circumstances that would justify him in so doing, sold a portion of the cargo to raise money necessary for repairs at a price beyond what they would have realized at the port of destination, and then, after the repairs were executed, completed his voyage, it was held that although the charterer received from the shipowner the proceeds of the cargo so sold, he was not bound to pay freight *pro rata* for its carriage (c).

In another case, a cargo had been shipped at Batavia to be delivered to the plaintiff at Rotterdam; the vessel was compelled by stress of weather to put into the Mauritius, where the cargo

(b) *Mitchell v. Darthez*, 2 B. N. C. 555.

(c) *Hopper v. Burness*, 1 C. P. D. 137; and see *Acatos v. Burns*, 3 Ex. D. 282.

was found to be so damaged that it was of necessity sold by the master, who acted in this respect *bonâ fide*, but without the knowledge of either the shipper or of the shipowner. The Court held that these facts afforded no presumption that the owner of the cargo had agreed to receive it at the intermediate port, and consequently that no freight had become due (*d*). Where before the completion of a voyage the goods and ship were seriously injured by sea perils, and the goods were returned by the master to one of the charterers not absolutely, but with an authority to him to act for the ship as well as the cargo, it was held (the goods having been sold by the charterer, under circumstances found to be reasonable by the jury) that freight could not be claimed from the charterers, and that they were not liable in damages for preventing the master from carrying on the goods and earning the charter freight. The Court was also of opinion, in this case, that the authority given by the master could not be countermanded by the shipowners after it had been acted upon and expense had been thereby incurred. In this case the ship was bound for Havana, with a general cargo under a charter-party at a lump freight; soon after leaving Liverpool the ship ran on the Irish coast and sustained serious damage, but was ultimately got into a port on that coast where the whole of the cargo was found to be so damaged as to be either actually incapable of being taken on, or incapable of being carried to its destination in a merchantable condition, except a portion, in respect of which the action was brought, which was taken back to Liverpool and there sold, under the authority given by the master (*f*).

Acts of consignees do not necessarily bind charterer.

Even where the consignees of the goods accept the goods under such circumstances as to render themselves liable for *pro rata* freight, it seems that they have no implied authority to bind the charterer and to render him liable (*g*).

(*d*) *Vlierboom v. Chapman*, 13 M. & W. 230. The rule of English law, as laid down in this case, was affirmed by the Court of Queen's Bench (dissentiente Cookburn, C. J.), and by the Court of Appeal, in *Metcalf v. The Britannia Iron Works Company*, 1 Q. B. D. 613; 2 Q. B. D. 423. The judgment of Cookburn, C. J., contains a thorough review of all the authorities, English and foreign. See also *Hill v. Wilson*, 4 C. P. D. 329, in which it was held that to entitle a ship-owner,

in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shown that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port.

(*f*) *Blasco v. Fletcher*, 14 C. B., N. S. 147.

(*g*) See *Metcalf v. Britannia Iron Works Company*, 2 Q. B. D. at p. 432.

It often becomes important, with respect to questions of freight, to ascertain whether the contract is for one entire voyage, or for several distinct ones. Thus, if a ship is to proceed from A. to B. and back, it is material to consider whether this is meant to be one, or two distinct voyages; for if the outward and homeward voyages are intended to be distinct so far as relates to freight, the non-performance of the return voyage will not affect the claim to the outward freight. The determination of this question depends in all cases upon the terms of the particular contract that has been made. No general rule can be laid down. Several of the cases, however, which have been already cited as to conditions precedent to the right to freight, will be found to bear on this point.

Single and
double
voyages.

Expressions such as "the outward and homeward voyages" are important to show an intention that they should be considered as distinct, and an opposite construction would probably be put upon a contract which contained a stipulation that the freight was to become due, or to be paid, at the home port (*h*). Where a charter-party provided that a vessel should ship goods for Kingston, or any other port in Jamaica, and having discharged the same should receive on board a cargo from thence, or from a port on the Spanish Main, if required, and deliver the same at a port in the United Kingdom on being paid a certain sum for freight in ten days after sailing from Gravesend, and a further sum in two months after a right delivery of the homeward cargo, provided she should be required to proceed to one port only in Jamaica, and a further sum should she be required to go to two or more ports in that island, and that in case she should be ordered to the Spanish Main, 4*l.* per day was to be paid for every day after the twenty-fifth after her arrival at Jamaica, until despatched from her loading port, (demurrage at a certain sum per month, or in proportion for a less period, payable on settlement of the hire of the ship,) it was held, that the meaning of the parties was that the voyage to the Spanish Main was to be part of the homeward voyage, not an intermediate one, and that the 4*l.* per day was not payable until two months after the delivery of the homeward cargo (*i*).

(*h*) See Malyne, p. 98; *Smith v. Wilson*, 8 East, 437; *Mackrill v. Simons*, Abbott on Shipping, 3rd ed. p. 316.

(*i*) *Crozier v. Smith*, 1 M. & Gr. 407; and see *Hudson v. Hill*, 33 L. J., C. P. 273.

Form of
claim for *pro*
rata freight.

It must be recollected, that where the contract provides for the delivery of the goods at a particular port, no action lies *on it* where this delivery is prevented, although there may have been an acceptance of the goods at an intermediate place. The right to freight, if it exist, arises out of a new contract, either express or implied (*k*).

RULES IN
COURT OF
ADMIRALTY AS
TO *PRO RATA*
FREIGHT.

The Court of Admiralty, where questions as to freight frequently arose in the cases of captured vessels, usually acted upon the same principles. Thus, it has been frequently decided that, in ordinary cases, the goods must be carried to their destination before a claim for freight can arise (*l*). There must be an entire execution of the contract, or such an execution as the shipowner can effect consistently with any incapacity under which the cargo may labour. Where the non-completion of the contract is caused by an incapacity of this description alone, the goods owner cannot allege that the contract is not performed (*m*). If, however, the vessel herself is incapacitated, the owner cannot demand the freight, for which he stipulated only on the performance of his engagement (*n*). Thus, where a ship sailed on a voyage from Liverpool to Halifax and back, and after proceeding about half way to Halifax she was captured and recaptured, and brought back to Plymouth, and the charter-party showed that the intention of the parties was that the freight should be paid on the completion of the voyage, it was held, that no freight *pro rata* was claimable (*o*).

Where a ship in distress put into an English port, after having performed the greater part of her voyage, and she was seized there, on suspicion, as a prize, and the cargo was necessarily taken out in order to repair the ship, but afterwards the cargo was restored, and at a later period the ship and part of

(*k*) *Cook v. Jennings*, 7 T. R. 381; and see *Liddiard v. Lopes*, 10 East, 526.

(*l*) See the judgments in *The Diana*, 5 Rob. 71; and in *The Vrow Anna Catharina*, 6 Rob. 271; also *The Etrusco*, cited 5 Rob. 69; and the cases collected in the following notes. This principle appears not to have been acted upon in *The Racehorse*, 3 Rob. 101; or in *The Hamilton*, cited by Sir W. Scott, *ib.* 107.

(*m*) If in the case of transhipment the master, by the default of the owners

of the cargo, is unable to forward it to its destination, the whole freight is payable, *The Soblomsten*, L. R., 1 A. & E. 293; *The Cargo ex Galam*, Br. & L. 167; 33 L. J., P. M. & A. 97; *The Cargo ex Argos*, L. R., 5 P. C. 134.

(*n*) See the judgment of Sir W. Scott in *The Fortuna*, Edw. 57.

(*o*) *The Hiram*, 3 Rob. 180; *The Wilhelmina*, *ib.* 234; and the judgment in *The Fortuna*, *ubi supra*.

the cargo were sent to London, the remainder of the goods being forwarded by another conveyance to its destination, it was held, that the shipowners were entitled to freight *pro rata*, and only *pro rata*, as the failure of the performance of the original contract was in no way owing to the cargo (*p*). And where a Swedish ship on a voyage to Lisbon was brought into an English port under an embargo against Swedish ships, and it became necessary to unload the cargo, which was claimed for merchants at Lisbon who were not subject to the embargo, and they were compelled to find another ship to convey it to its market, the Court held, that as the detention and the carriage of the cargo out of its course had arisen by reason only of the national character of the ship without any co-operation on the part of the cargo, no freight was payable (*q*).

So, where a cargo belonging to English merchants was to be taken by a Swedish ship to Venice, and a few days after the vessel sailed she was obliged by bad weather to put into Falmouth, where she was detained under an embargo against Swedish ships, but her cargo was restored to the merchants, it was held, that they were not liable for any freight, although they were bound to pay the expenses incurred by the ship on account of the cargo (*r*).

Captors who perform the contract by carrying the goods to their destination are usually entitled to freight. This is the general rule (*s*). And in some cases, which are rather equitable applications of this rule than extensions of it, it has been held, that freight is payable although the voyage has not been performed. Thus, where the goods had not been carried to the actual port of destination in Holland, but to this country, to which the merchants had intended them finally to come, and to which they would have been consigned in the first instance but for regulations of the Dutch Government which prevented their being brought here directly, the Court held that they had been brought to their real, although not to the nominal destination, and that freight was therefore due (*t*). And in the cases of the American ships bound to France or Holland, which were brought into the ports of this country under the prohibitory law in force

Application of rule in cases of capture and substantial performance of contract.

(*p*) *The Copenhagen*, 1 Rob. 289.

(*q*) *The Worldsborgaren*, 4 Rob. 17.

(*r*) *The Isabella Jacobina*, 4 Rob. 77.

(*s*) *The Fortuna*, 4 Rob. 278; *The Diana*, 5 Rob. 67; *The Vrow Anna Catharina*, 6 Rob. 269.

(*t*) *The Diana*, 6 Rob. 67.

during the war of the beginning of this century, the full freight was pronounced to be due where the owners of the cargoes elected to sell here, for the Court considered that a voyage from America to this country was nearly the same in effect as a voyage to the contiguous countries to which the vessels had been originally destined (u).

The decisions in the Court of Admiralty in the cases of neutral vessels carrying, in war time, cargoes liable to seizure, do not, properly speaking, form exceptions to the general rule mentioned above, since in these cases the voyage is, as against the party who is to pay freight, considered to be completed. Thus, it has been long settled that a neutral ship may carry the goods of an enemy, subject to the right of the other belligerent to bring in the ship for the purpose of obtaining an adjudication on the cargo (x). And it has usually been the practice of the Court of Admiralty to allow freight to neutral vessels, where the cargo is condemned as enemy's property, and the ship is restored: for in these cases *capture is equivalent to delivery*; that is to say, the captor who possesses himself *jure belli* of the enemy's goods is considered to represent the enemy, and since he prevents by his seizure the completion of the voyage, and the earning of the whole freight, the capture, as against him, operates as an actual delivery of the goods to the consignee (y).

(u) See the judgment of Sir W. Scott in *The Friends*, Edw. 246.

(x) See the judgments in *The Bremen Flugge*, 4 Rob. 91, and in *The Vrow Henrica*, *ib.* 347. The right of neutral ships to carry enemy's goods in time of war depends of course on the terms of particular treaties. In the treaty assented to at the Congress of Paris (April 16, 1856), it was declared (by art. 2), that the neutral flag covers enemy's goods with the exception of contraband of war; and (by art. 3) that neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag. The history of and the authorities on this subject will be found in Twiss's *Law of Nations*, Chap. V., and Phillimore's *International Law*.

(y) See the judgment in *The Copenhagen*, 1 Rob. 291; the note to *The Atlas*, 3 Rob. 304; and the judgments in *The Bremen Flugge*, 4 Rob. 91, and in *The Prosper*, Edw. 76. If the ship and cargo, being both neutral, are restored, the ship must proceed and com-

plete her voyage before she can demand freight. See the judgment in *The Copenhagen*, *ubi supra*. In these cases the captor takes *cum onere*, and the freight is a lien which precedes all other claims; unless, indeed, there have been *mala fides* in the transaction, or the ship has been guilty of a departure from pure neutral conduct; as, for instance, by carrying from one enemy to the colony of another allied in the war, or by carrying on for the enemy his coasting or his colonial trade, or by acting in his revenue service. See the judgment in *The Vrow Henrica*, 4 Rob. 347, and the cases cited at the commencement of this note; also *The Rose*, 2 Rob. 206; *The Emanuel*, 1 Rob. 296; *The Immanuel*, 2 Rob. 186; *The Rebecca*, *ib.* 101; and *The Conventientia*, 4 Rob. 201. See also the American cases, *The Fanny*, 10 Wheaton, 658; *The Commerce*, 2 Gallison, 264. The principle which is acted upon in these cases is, that on the breaking out of a war, neutrals have a right to carry on their accus-

Freight is usually recoverable after capture and re-capture, if the voyage is completed (s). Effect of capture and re-capture.

In a recent case the charter-party was held, under very peculiar circumstances, to be substantially performed, although the ship was unable to proceed to the particular port to which she was ordered. In that case the master of a Prussian ship agreed by charter-party with the plaintiffs to load a cargo at a foreign port in South America and proceed therewith to Cork, Cowes or Falmouth, for orders to any safe port in Great Britain or on the Continent between Havre and Hamburg. The cargo was loaded under a bill of lading which contained amongst other exceptions that of Queen's enemies. The ship arrived at Falmouth with the cargo on board, and she received orders to proceed to and sailed for Dunkirk; when off that port her master learned, as the fact was, that war had just broken out between France and Prussia. The ship then proceeded to Dover and there remained. The plaintiffs then demanded of the master delivery of the cargo at Dover, but made no offer to pay freight, and gave no orders to the master to sail to any port other than Dunkirk. In these circumstances it was held that as it was impossible for the ship to go to Dunkirk, and as the ship, without any breach of contract on the part of the shipowner, had arrived at Dover, which was one of the ports included in the charter-party, and as the plaintiff had demanded the cargo there, the shipowner was entitled to claim a lien on the cargo for the full freight (a). Substantial performance of charter.

It is said by Molloy, that if cattle are sent on board and the FREIGHT FOR CATTLE.

toned trade; but they are not entitled to engage in trades which are open to them only by reason of the accidents of the war. See *The Wilhelmina*, 2 Rob. 101, note, and the judgment in *The Immanuel*, *ubi supra*. Freight is not allowed if the articles carried are contraband according to the law of nations, such as tar or sail cloth; for indirect assistance is afforded to the enemy by the carriage of these goods. *The Mercurius*, 1 Rob. 288, and *The Oster River*, 4 Rob. 199. It appears that tar, when the produce of the country of the owner of the cargo, may be carried subject to being brought in, not for confiscation, but for pre-emption. See the judgment in *The Sarah Christina*, 1 Rob. 241; and further, as

to contraband of war, *post*, Chap. VII., INSURANCE. The freight which the captor must pay in these cases is usually measured by the terms of the charter-party; but if there has been any fraud in the transaction, or if the hazard of the war has raised the rates of freight to an extraordinary degree, this measure will not be adopted. See the judgment in *The Twilling Riget*, 5 Rob. 85.

(z) See the judgment in *Beale v. Thompson*, 3 B. & P. 428; and *Bergstrom v. Mills*, 3 Esp. 36; see also *Moorson v. Greaves*, 2 Camp. 627.

(a) *The Teutonia*, L. R., 3 A. & E. 394; 4 P. O. 171. See *The Patria*, L. R., 3 A. & E. 436.

freight is to be paid for their lading, it becomes due even although they die on the voyage, and that this is the rule if there is no particular agreement made either as to the lading or as to the transport; but that it is otherwise if the freight is to be paid for transporting them (b). In practice any case of this kind would depend upon the terms of the particular contract under which the cattle were shipped.

**EFFECT OF
DETENTION IN
CASE OF TIME
CHARTER.**

Questions have arisen as to the effect of a detention during the voyage on the claim for freight where it is to be paid at so much for a given time, as, for instance, at so much per month. The determination of these cases depends also upon the terms of the contract. The general rule is, that the freight continues payable, if the detention does not defeat the object of the voyage, or suspend the contract, and does not proceed from the default of the shipowner (c).

**EXPRESS
PROVISION FOR
DEDUCTION
FROM FREIGHT
IN CASE OF
DELAY.**

In a case in which the contract provided that a deduction should be made from a gross sum payable for the freight, "in case of the inability of the ship to execute or proceed on the service;" these words were held to extend to an inability to proceed to sea caused by the death and desertion of some of the crew owing to the existence of small pox on board (d).

**DAMAGE TO
GOODS AND
SHORT DE-
LIVERY AS
AFFECTING
FREIGHT.**

Prior to the Judicature Acts it was held, that where the goods were carried and delivered to the merchant, he was not entitled to abandon them, or to resist the payment of freight by reason of their being damaged, unless there was some stipulation to this effect in the contract. The injury to the goods, if caused by the negligence of the master, would only afford matter for a cross action (e). And where a complete cargo was to be laden

(b) See *Molloy*, B. 2, c. 4, s. 8. By the Roman law, if a contract was made for the carriage of slaves, no deduction was to be made from the freight in respect of any of them that might die on the voyage, unless it appeared from the agreement that the shipper intended to pay for those only who were safely landed. Dig. lib. 14, tit. 2. See, as to a contract to pay the highest freight which the shipowner could prove to have been paid for ships on the same voyage, *Geither v. Capper*, 15 C. B. 39, 696, and 18 C. B. 866. See

also *McAndrew v. Chapple*, L. R., 1 C. P. 643.

(c) See *Havelock v. Geddes*, 10 East, 556; *Moorsom v. Groves*, 2 Camp. 627; *Ripley v. Scarfe*, 5 B. & C. 167, and *Valente v. Gibbs*, 6 C. B., N. S. 270; and also *ante*, pp. 324, 332, as to the suspension of the contract by war, blockade, or the like.

(d) *Beatson v. Shank*, 3 East, 233.

(e) *Hotham v. East India Company*, 1 Dougl. 271; *Garrett v. Molhuish*, 4 Jur., N. S. 943, V.-C. Stuart, *Stimson v. Hall*, 1 H. & N. 831; *Alston v. Herring*, 11

and delivered on freight being paid, it was held that the delivery of a *complete* cargo was not a condition precedent, the freighter having his remedy in damages for any short delivery (*f*). Nor could the consignee of goods under a bill of lading deduct from the freight payable in respect of the goods delivered the value of articles which, although mentioned in the bill of lading, have by mistake never been shipped (*g*). Where freight was to be paid upon the right and true delivery of the cargo agreeably to bills of lading, it was held to be payable upon proof of the entire number of casks mentioned having been delivered, although it appeared that the contents had been damaged by the negligence of the master and crew; the party injured having in such a case his counter-remedy by action for the negligence (*h*).

But although the principle of these decisions remains unaffected, the provisions of the Judicature Act, 1873 (*i*), which entitle a defendant to set up a counter-claim by way of answer to an action, altogether alters their practical effect, because to an action for freight the defendant may now, subject to the provisions of the Rules of the Supreme Court, Ord. XIX., rule 3, set up in answer to the claim for freight, a counter-claim for damage to the cargo.

No claim can be set up by the purchaser of a cargo against the seller in respect of short delivery, if it appears from the terms of the contract between them, that it was intended that the purchaser should take the chance of the quantity turning out more or less (*j*).

Claims by purchaser in respect of short delivery.

Where a cargo of wheat, to be shipped, had been sold, and the contract note mentioned certain quantities as the maximum and minimum to be shipped, it was held that the purchaser was entitled to refuse to accept the shipping documents, or to pay for the cargo, as the bill of lading and shipping documents

Ex. 822. In an action for freight due upon a charter-party, a plea, alleging that, by the fault of the master and crew, and their negligent and unskilful navigation of the vessel, the cargo was damaged, so that upon its arrival it was of less value than the freight, and that the charterer thereupon abandoned the cargo to the shipowner, was held bad. *Dakin v. Ozley*, 15 C. B., N. S. 646. The foreign authorities are fully discussed in the judgment of this case. See also *The Norway*, Br. & L. 377.

(*f*) *Ritchie v. Atkinson*, 10 East, 295; and see *Christie v. Row*, 1 Taunt. 300; *Gibson v. Sturge*, 10 Ex. 622; and see the judgment in *White v. Beeton*, 7 H. & N. 42. There is no case in which the delivery of less than a complete cargo has not been held to be apportionable.

(*g*) *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289.

(*h*) *Davidson v. Gwynne*, 12 East, 381.

(*i*) Sect. 24, sub-s. 3.

(*j*) *Covas v. Bingham*, 2 E. & B. 836.

represented the cargo to consist of a greater quantity than the maximum fixed. It was also held that the purchaser was not bound to pay for the cargo, or to accept shipping documents which represented it to be within the prescribed limits, if in fact it exceeded them (*j*).

AMOUNT AND
CALCULATION
OF FREIGHT.

The terms of the charter or bill of lading under which a cargo is shipped are usually sufficiently specific to make the amount of freight payable a mere matter of calculation (*k*). Questions, however, may arise as to the time and manner of measurement of the cargo according to which freight is to be paid, and which are of practical importance where a cargo increases or decreases in weight during the voyage. The rule to be followed in these cases was much discussed in a case where a cargo of corn shipped at Odessa became heated and damaged during the voyage whereby its bulk increased. It was held that freight was payable only on the quantity shipped, and not on its measurement at the port of discharge (*l*). To obviate this doubt, bills of lading sometimes provide that freight shall be payable on "nett weight delivered" (*m*); but where it is intended to make the freight payable on the quantity of cargo delivered apt words must be used. In a case where the charter-party stipulated that the ship should load a cargo of cotton and proceed with it to Liverpool, and deliver the same on being paid freight at the rate of 75s. per ton delivered, it was held that freight was payable on the quantity shipped, and that the word delivered was only inserted to show that any goods not delivered were not to be paid for (*n*). It is common in grain charter-parties to

(*j*) *Tamvaco v. Lucas*, 1 E. & E. 581—592. See also *Tamvaco v. Lucas*, 1 B. & S. 185, where a question arose on a similar contract as to the sufficiency of a policy of insurance, tendered as one of the shipping documents.

(*k*) If there be no proof to the contrary the quantity named in the bill of lading will be taken to be that upon which freight must be paid. *Tully v. Terry*, L. R., 8 C. P. 679. It is not uncommon to reserve to the charterer the option of shipping any of several classes of goods, and to stipulate that a named rate of freight shall be paid if a particular class of goods is shipped, or that if other goods are shipped freight shall be paid in proportion according to the London Baltic

printed rates or other printed rates. As to the effect of such a stipulation see *The Southampton Steam Colliery Company v. Clarke*, L. R., 4 Ex. 73, 6 Ex. 67. The holder of a bill of lading comprising the whole cargo is commonly entitled to deduct address commission from the freight. *The Norway*, Br. & L. 404. As to custom respecting discount see *Falkner v. Earle*, 32 L. J., Q. B. 124. As to the liability of the indorsee of a bill of lading to pay primage see *Caughy v. Gordon*, 3 C. P. D. 419.

(*l*) *Gibson v. Sturge*, 10 Ex. 622, where see the foreign authorities cited.

(*m*) *Coulthurst v. Sweet*, L. R., 1 C. P. 649.

(*n*) *Buckle v. Knoop*, L. R., 2 Ex.

insert special clauses which confer upon the master, in the event of the cargo being delivered in a damaged or heated condition, to demand freight upon the invoice quantity as per bill of lading, or half freight, upon the damaged or heated portion (*o*).

Where there has been a transshipment, questions of some difficulty have arisen as to the rate of freight which is recoverable. Where goods were shipped in a general ship under a bill of lading, in which the freighter was named as the consignee, and the completion of the voyage was prevented by damage done to the ship by tempest, but the goods were forwarded by the master to their destination by another ship, under a bill of lading making another person consignee, it was held, that the freighter was liable, on the receipt of the goods, for the whole freight originally contracted for, although they were carried by the second conveyance at a less freight (*p*).

In case of transshipment.

The chief remaining incidents which belong directly to the subject of freight are its *recovery*, and the *shipowner's lien in respect of it*.

Under the first of these heads we shall consider the parties liable to pay freight under the usual contracts, and the ordinary remedies for its recovery.

RECOVERY OF FREIGHT.

In order to render a person liable to pay freight, there must be an express or implied contract for its payment between him and the shipowner (*q*).

General rules as to party liable.

This proposition appears to be self-evident, but it is necessary to state it, because difficulties have arisen in many

125, 333. See the same case as to evidence of custom in such a case, and see *supra*, p. 294. In *Spaight v. Farnworth*, 5 Q. B. D. 115, a cargo of deals and battens was shipped under a charter-party by which freight was to be paid on the "intake measure of quantity delivered." The various pieces were measured by the shipper at the port of shipment. A number of the pieces were lost during the voyage, their dimensions were unknown, but they were of average size with the rest of the cargo. It was held that the freight was payable on the intake measurement, and that the amount of

freight was to be ascertained by making in respect of the last pieces a proportionate reduction from the sum total of the measurement of the cargo.

(*o*) See *Tully v. Terry*, L. R., 8 C. P. 679.

(*p*) *Shipton v. Thornton*, 9 A. & E. 316.

(*q*) See the judgment of Grose, J., in *Ward v. Felton*, 1 East, 513, and *Smidt v. Tiden*, L. R., 9 Q. B. 446. As to evidence of an implied contract on the part of the vendor of goods to pay for the goods "freight" at a rate exceeding the freight mentioned in the bill of lading, see *Swan v. Barker*, 5 Ex. D. 130.

cases from its being overlooked. There is no *rule of law* that in this or that case a liability arises to pay freight, it is always a question of *fact* to be decided upon the particular circumstances of each case. Several contracts may exist simultaneously binding different parties to pay the same freight; for instance, the shipper may be liable on his express contract by charter-party, or on the implied one arising from the shipment, and the indorsee of the bill of lading, or the consignee, receiving the goods under the bill of lading, may, at the same time, be liable on an implied contract arising from such receipt. In these cases there is no transfer of liability. It seems, indeed, to have been at one time supposed that the contract was ambulatory, and that when the goods were delivered the shipper ceased to be liable because his liability was transferred to the party taking the goods, but it is now established that the shipper continues liable on his original contract, and that the person receiving the goods may be liable also, upon a new contract, the consideration for which is the delivery of the goods to him (r).

Receipt of goods under a bill of lading, as affecting liability to pay freight.

As a general rule, the indorsee of a bill of lading is bound by its terms upon receiving the cargo under it. Thus, where by the bills of lading the goods were to be delivered to certain persons or their assigns, "he or they paying freight for the same," it was held, that the demanding and receiving of these goods from the master by a purchaser and assignee of the bill of lading was evidence of a new contract by him to pay the freight, as the

(r) See *Christy v. Row*, 1 Taunt. 300; *Shepard v. De Bernales*, 13 East, 565; *Sanders v. Vanzeller*, 4 Q. B. 288; *Kemp v. Clark*, 12 Q. B. 647. The fact that a cargo is received under a bill of lading, although not necessarily raising a contract in law, is evidence from which a jury may infer a contract to pay freight in consideration of the captain giving up his lien on the goods, *per Parke, B.*, in *Young v. Moeller*, 5 E. & B. 760. In *Drew v. Bird*, M. & M. 156, it was ruled at Nisi Prius, that where there is no charter-party the shipper is not liable to pay freight if the bills of lading state that it is to be paid by the consignee or assigns; but this case is not law. See *per Parke, B.*, in *Sanders v. Vanzeller*, *ubi supra*. The 18 & 19 Vict. c. 111, s. 2, which places consignees named in bills of lading, and indorsees to whom

the property in the goods has passed by the consignment or indorsement, in the same position as if the contract contained in the bill of lading had been made with themselves, expressly enacts that nothing in the act contained shall prejudice or affect any right to claim freight against the original shipper or owner, or any liability of the consignees or indorsees in consequence of their being such, or of their receipt of the goods, by reason or in consequence of the consignment or indorsement. But this does not mean that an indorsee of a bill of lading who has not received the goods and who has incurred no liability to pay freight save by virtue of the statute, remains liable after he has indorsed away the bill of lading, and parted with all his interest in the goods. See *Smurthwaite v. Wilkins*, 11 C. B., N. S. 342, *supra*, p. 346.

ultimate appointee of the shippers for the purpose of delivery (*s*). So, where goods were shipped in a chartered vessel under bills of lading, which made them deliverable to the shipper's order, or his assigns, "he or they paying freight according to the terms of the charter-party," and the goods were landed at the West India Dock, and the bills of lading were afterwards indorsed by the then holder to the defendants, as his brokers, who received the goods under them, and sold them, accounting to their principal for the proceeds, it was held that they were liable for the freight, although they had paid over the proceeds before it was demanded of them (*t*). But where the goods were not consigned to the defendant, although it had been intended at one time that this should be done, but to a third person, to whose order the bills of lading were made, and one of these bills, not however indorsed to the defendant, was sent to him in a letter, advising him of the consignment, and requesting him, in case the consignee should not have arrived at the port of discharge, to do the best that he could for the shippers, upon which the defendant, (acting as agent for the consignee in his absence,) caused the goods which were damaged to be landed at the King's warehouse, in compliance with the requisitions of an act of Parliament, and entered them at the Custom House in his own name to prevent their seizure, it was held that this was not an acceptance from which a contract to pay the freight could be implied (*u*). So, where the bills of lading made the cargo deliverable to the consignees or their assigns, "he or they paying freight for the same," and they indorsed them to the defendants, their brokers, who were largely in advance to them, and the defendants entered the goods at the Custom House in their own names, but landed them at the docks in the names of the consignees, and afterwards obtained possession of the goods, not under the bills, but under a delivery order from

(*s*) *Cock v. Taylor*, 13 East, 399; see also *Roberts v. Holt*, 2 Show, 443; *Stindt v. Roberts*, 5 D. & L. 460; *S. C.*, 17 L. J., Q. B. 166, and the observations on this case by Parke, B., in *Young v. Mosler*, 5 E. & B. 760; *Artaza v. Smallpiece*, 1 Esp. 23, is apparently not law. Where the language of the bill of lading was "freight for the said goods 4l. 6s. per ton net delivered, with primage and average accustomed, it was held that its effect was the same as "he or they paying freight

for the same." *Weguelin v. Cellier*, L. R., 6 H. L. 286.

(*t*) *Bell v. Kymer*, 5 Taunt. 477; and see *Pindar v. Wilks*, *ib.* 612, and *Dougal v. Kemble*, 3 Bing. 383. Where the facts are sufficient to raise an implied promise to pay freight on receipt of the goods, it appears to be immaterial that the bill of lading is for delivery to the consignees, omitting the words "or their assigns." See *Renteria v. Ruding*, M. & M. 511.

(*u*) *Ward v. Felton*, 1 East, 506.

the consignees for that purpose, it was held that these facts alone did not raise any implied promise by the defendants to pay the freight. As it appeared, however, that the defendants had on former occasions obtained the delivery of other goods under similar orders from the same consignees, and had always paid the freight, the Court said that the jury was justified in implying from this fact a liability on their part (x). Where, by a charter-party under seal, a ship was chartered on a voyage out and home for a specified time at a certain rate of payment on the homeward cargo, in full for the hire of the ship, to be paid partly in advance, and partly by bills to be given on the return of the ship, and the bills of lading stated that the goods were to be delivered to a consignee named in them, or his assigns, "he or they paying freight as per charter-party," and one of the bills was indorsed for a valuable consideration to the defendants, to whose order the goods were delivered, after they had been transferred in the books of the Dock Company, and entered at the Custom House, and landed, and warehoused in their names, the Court held, upon a case stated for their opinion, that they were not liable to pay the freight (y).

Where goods were shipped by merchants at Bombay, and by the bills of lading were to be delivered "unto order, or to his or their assigns on paying freight for the said goods," and the bills were indorsed and forwarded to the defendants in London, who indorsed them in blank to their factors, who received the goods under the bills but without paying the freight, and were debited with the amount by the shipowner, who did not know that they were only agents, and afterwards they became bankrupt, upon which the defendants obtained the goods from them, it was held, that there was no implied contract by the defendants to pay freight to the shipowner, although the bills of lading had been indorsed without consideration to the factors as agents only for the defendants, and the goods, at the time of the delivery to the factors, were the property of the defendants; for it was considered, that as the agents were the only actual indorsees and holders of the bills, and the shipowner did not require payment

(x) *Wilson v. Kymer*, 1 M. & S. 157. It is observable that in this case the whole ship was let to the consignees by the charter-party, and the shipowners had proved against them on their bankruptcy for freight under the charter-party.

(y) *Mooroom v. Kymer*, 2 M. & S. 303. This case was decided in some degree upon the ground that there was a remedy for the same freight against the charterer; but it appears to be clear now that this is not material. See *ante*, p. 382.

before the delivery of the goods, he must be taken to have given credit to them alone, and that there was nothing to show that the defendant had given any authority to their agents to pledge their credit for the freight. To the objection that it would be unjust that the defendants should receive their goods without paying any freight, the Court answered that it was the voluntary act of the shipowner to give credit to the factors, and that if he was indebted to them to the amount of the freight, the freight would be set off against the debt, and then that the assignees of the bankrupt factors might recover the full amount of the freight against the defendants, subject to any cross demand (z). So, no promise to pay freight will be implied when, on the face of the bill of lading, the person who receives the goods is merely agent for the consignees; as where the goods were deliverable to "A. B. (the defendant) for the London Gas Company, he or they paying freight;" the promise to be inferred from the receipt of goods under such a bill of lading being, *prima facie*, a promise as agent only to pay the freight on account of the company (a).

And from the fact of the receipt of goods under a bill of lading which makes them deliverable on payment of freight as per charter-party, no contract can be implied on the part of the assignee of the bill of lading to unload the vessel in a reasonable time, although the charter provides for payment of demurrage after a certain number of lay days (b).

In all these cases, whether the bills of lading refer to a charter-party or not, no contract is implied *by law* from the facts. There is no such implication even where a bill of lading specifies that the goods are to be delivered by the shipowner to the consignee or his assigns, he or they paying a certain specified sum for freight, without any reference to a charter-party, and the goods are received by an indorsee by virtue of such a bill; although there is evidence in this case to warrant a jury in finding such a contract, and it has been so much the practice for the indorsee of such a bill of lading to pay the specified freight if he accept the goods under it, that there is little or no doubt

(z) *Tobin v. Crawford*, 5 M. & W. 225; *S. C.* in Cam. Scacc. 9 M. & W. 716.

(a) *Amos v. Temperley*, 8 M. & W. 798; and see the observations on this case in *Story on Agency*, p. 348, n. (3), 3rd ed.

M.P.

(b) *Young v. Moeller*, 5 E. & B. 755. But see *Fowler v. Knoop*, 4 Q. B. D. 299, where it was held that there was an implied obligation on the part of a consignee named in a bill of lading to take delivery within a reasonable time.

that a jury would, on such a question, find in favour of the shipowner, if the indorsee received the goods without a disclaimer of his liability. But there is no authority for saying that, under such circumstances, there is a contract raised by law to pay the freight which another, namely, the consignor, has contracted with the shipowner to pay. And it is clear that the contract does not (except in cases in which the 18 & 19 Vict. c. 111, is applicable) run with the property in the goods. If there is any liability in the indorsee of the bill of lading by reason of the receipt of the cargo under it, it is on a new original contract, the consideration for which is the delivery of the goods to him (c). Where there is no bill of lading the consignee is not usually liable, but prior payments of freight by him on former occasions of a similar kind are reasonable evidence, even in this case, to show that on the receipt of the goods he contracts to pay the freight (d).

Where goods are carried in a ship belonging to their owner no freight is payable, and in such a case it is usual to insert in the bill of lading either a nominal freight, or "free on owner's account." Where a master signed bills of lading in the latter form, in ignorance of the fact that the ship had been sold, it was held that the purchaser was bound by those terms, and could not claim freight against merchants to whom the ship was originally consigned, and to whose order the bills of lading were made out (e). If, however, the person who is both shipowner and goods owner consigns the goods to merchants, who make advances on them, and by the bill of lading they are made deliverable to their order, they must pay any freight named in the bill of lading (f).

Master not
bound to
insist upon

It is now well settled that the usual clause in bills of lading engaging the master to deliver the goods to the consignees or

(c) See for these positions the judgment of Tindal, C. J., in *Sanders v. Vanzeller*, 4 Q. B. 295; *Zwischenbart v. Henderson*, 9 Ex. 722, and the cases cited *ante*, p. 381, n. (g).

(d) *Coleman v. Lambert*, 5 M. & W. 502. In *Smidt v. Tiden*, L. R., 9 Q. B. 446, the cargo was shipped under bills of lading making the cargo deliverable on payment of freight as per charter-party. In point of fact there were two charter-parties, one known to the plaintiff but not to the defendant, and

a sub-charter at a different rate of freight known to the defendant but not to the plaintiff. It was held that the plaintiff could not recover any freight, because the parties were not *ad idem* and there was no express contract, and that under the circumstances no contract to pay freight could be implied.

(e) *The Mercantile Bank v. Gladstone*, L. R., 3 Ex. 233.

(f) *Weguelin v. Cellier*, L. R., 6 H. L. 286.

assignees, "he or they paying freight," is introduced for the benefit of the master only, and does not cast upon him the duty of obtaining at his peril the freight from the consignees at the time of the delivery (*g*). The consignor still remains liable for the freight on his express contract in the charter-party, or on his implied undertaking arising from the shipment, although the goods have been delivered to the consignee without obtaining the freight, unless there has been what amounts in substance to payment by the consignee.

payment of freight before delivery.

Where cash has been offered, but the master has elected to take from the consignee a bill of exchange which is afterwards dishonoured, the remedy against the consignor is lost (*h*). The mere taking of a bill of exchange from the consignee, however, does not affect the remedy against the consignor, unless there has been an option to take either a bill or cash, and the master has, for his convenience, preferred the former (*i*).

Effect of taking a bill of exchange from the consignee on remedy against shipper.

Where a cargo was accepted by the indorsee of a bill of lading under which the goods were deliverable to order, "against payment of the agreed freight and other conditions as per charter-party," it was held that these were circumstances from which the jury might imply a contract on the part of such indorsee to pay the demurrage stipulated for in the charter-party, notwithstanding his refusal, at the time of receiving the goods, to pay the demurrage (*k*). It must be observed, however, that the words used in the bill in this case were peculiar, and that the demurrage accrued from the delay of the holder of the bill of lading himself, at the port of discharge; and in a later case it was held, that the consignee of a bill of lading which makes the goods deliverable to him or assigns, "paying freight for the said goods as per charter-party," does not by taking the goods at the destination make himself liable to pay demurrage in the port of loading, according to the rate stipulated

INCORPORATION OF OTHER CONDITIONS OF CHARTER-PARTY IN BILL OF LADING.

Demurrage.

(*g*) Other words similar to the words "he or they paying freight" have received the same construction; *Weguelin v. Cellier*, L. R., 6 H. L. 286.

(*h*) *Tapley v. Martens*, 8 T. R. 451; *Christy v. Row*, 1 Taunt. 300; *Shepard v. De Bernales*, 13 East, 565; *Dommett v. Beckford*, 5 B. & Ad. 521; *Tobin v. Crawford*, 5 M. & W. 235; 9 M. & W. 716.

(*i*) *Marsh v. Pedder*, 4 Camp. 257. In *Strong v. Hart*, 6 B. & C. 160, there

was no evidence that cash had been tendered, yet it was held that the jury was properly directed that the consignor was discharged if the master took the bill voluntarily and for his own convenience. See also *Anderson v. Hillies*, 12 C. B. 499; and as to set-off against freight, see *De Pothonier v. De Mattos*, E. B. & E. 461; *Wilson v. Gabriel*, 4 B. & S. 243.

(*k*) *Wegener v. Smith*, 15 C. B. 285.

in the charter-party, although there be an express stipulation for a lien on the goods for such demurrage (*l*). In another case a cargo was shipped for London under a charter-party, by which the charterer contracted to pay a certain freight, and it was provided that he should have a fixed number of days for loading and unloading, and that he should pay so much per day for any detention of the ship beyond that period. A bill of lading made the cargo deliverable to the consignees in London, or order, "he or they paying freight as per charter-party;" and in the margin was written "there are eight working days for unloading in London." The vessel was detained some days beyond the eight working days. The consignees having received the cargo, and paid the freight, but having refused to pay demurrage, it was held that there was nothing in this marginal statement, or in the receipt of the cargo, which imposed upon them any liability to pay demurrage (*m*).

In a case where the bill of lading contained the exceptions, act of God, king's enemies, and accidents of the seas, and provided that the cargo should be delivered unto order or assigns paying freight for the said goods and *all other conditions as per charter-party*, the Court was of opinion that the reference to the charter-party meant nothing more than paying freight and fulfilling such conditions as were to be fulfilled by the shipper, and that it did not incorporate an exception "restraint of princes" which was in the charter-party (*n*).

Average.

So where a consignee, not the owner of the goods, received them under a bill of lading, by which they were to be delivered to him or his assigns, "paying freight for the same, with primage and average accustomed," but which did not mention *general average*, the Court refused to imply any promise by him to pay general average, which is usually a charge on the owner of the goods; even although the defendant had notice before he received the goods that they had become subject to it (*o*).

Discount.

Where a bill of lading expressed that the goods were deliverable to order or assigns, "he or they paying freight for the said goods, five-eighths of a penny sterling per pound, with five per

(*l*) *Smith v. Steeking*, 4 E. & B. 945; 5 E. & B. 689.

(*m*) *Chappel v. Comfort*, 10 C.B., N.S. 802; *Fry v. The Chartered Mercantile Bank of India*, L. R., 1 C. P. 689.

(*n*) *Russell v. Niemann*, 17 C.B., N.S. 163; 34 L. J., C. P. 10; see *The Felix*, L. R., 2 A. & E. 273.

(*o*) *Seafie v. Tobin*, 3 B. & Ad. 523.

cent. primage and average accustomed," and by the usual custom at the port of delivery three months' interest or discount was deducted from freights payable under bills of lading, on goods such as those in question, it was held that the assignee of the bill of lading who had received the goods was only liable to pay the freight, less the discount, and that the custom was binding, and did not contradict the bill of lading (*p*).

We will now consider the shipowner's *lien for freight*,— LIEN FOR
FREIGHT.
a right which exists without any express stipulation, but which has a material bearing on the contract of affreightment.

The shipowner has, independently of any express terms in the contract, a lien on the goods actually carried for the freight due in respect of them. He has also a lien on the cargo for any sum which by the charter-party is to be paid for the hire of the ship, although it may have no relation to the quantity of goods actually carried, but is calculated only on the tonnage of the vessel (*q*). The law, however, confers no lien in respect of breaches of covenants in the charter-party other than those relating to the payment of freight for goods actually carried (*r*). No lien, therefore, exists, in the absence of express stipulation, for dead freight (*s*), demurrage (*t*), wharfage (*u*), or port charges (*x*). But a charter-party may be so framed as to confer a lien for these charges or for unliquidated damages (*y*).

The general rule is as stated above, but it often happens that the effect of the particular contract of carriage which the parties have entered into is to deprive the owners of this right, owing

(*p*) *Browne v. Byrne*, 3 E. & B. 703; *Moeller v. Young*, 5 E. & B. 755, in the Exchequer Chamber, reversing the decision of the Court of Queen's Bench; see 5 E. & B. 7.

(*q*) *Campion v. Colville*, 3 B. N. C. 17; *Neish v. Graham*, 8 E. & B. 505.

(*r*) *Birley v. Gladstone*, 3 M. & S. 205; *Gladstone v. Birley*, 2 Mer. 401; *Faith v. East India Company*, 4 B. & A. 630; *Pearson v. Götschen*, 17 C. B., N.S. 352; *Gray v. Carr*, L. R., 6 Q. B. 522.

(*s*) The term "dead freight" denotes an agreed sum to be paid in respect of space not filled according to charter or damages provided for by a charter in the event of the freighter not loading a full cargo. See *Birley v. Gladstone*, *ubi supra*; *Phillips v. Rodie*, *ubi*

supra. A lien for "dead freight" will not usually apply to room lost from the charterer not loading according to charter; *Pearson v. Götschen*, 17 C. B., N. S. 352, where see an explanation of dead freight given by Willes, J.; *Gray v. Carr*, L. R., 6 Q. B. 352.

(*t*) *Phillips v. Rodie*, 15 East, 547.

(*u*) *Bishop v. Ware*, 3 Camp. 360.

(*x*) *Faith v. East India Company*, *ubi supra*.

(*y*) *McLean v. Fleming*, L. R., 2 H. L. Sc. 121, where Lord Chelmsford reviews the earlier cases. The effect of special conditions of this character have chiefly been discussed in cases where it has been stipulated that there shall be a lien for demurrage. See *post*, Chap. VI., Part II.

to the terms of the contract being inconsistent with it. Questions of considerable nicety have arisen on this point.

Loss of lien
by reason of
particular
contracts.

There is usually no lien for freight which has not become due at the time when the goods are to be delivered. It was accordingly held that no question of lien could arise where the contract made between the shipper of the goods and the shipowner was that a gross sum for the use of the ship was to be paid within a certain period after she had cleared from the Custom House, and the shipper had insisted (there being nothing in the charter-party to prevent him) on taking out the cargo before the ship sailed (z). And where by a charter-party the ship was to deliver her cargo "on being paid freight" at a certain rate, but by a subsequent clause it was agreed that the freight was to be paid "on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report," it was held, that, taking these stipulations together, the intention was that the freight was not to be paid until two months after the inward report, and that the shipowner had therefore no lien (a). So where the freight is payable by the bill of lading according to the charter-party, and the charter-party fixes a certain period after the delivery of the goods for the payment, or where the freight is payable "ship lost or not lost" (b), there is no lien (c). Where good and approved bills were to be given in payment of the freight, and the shipowner took a bill in payment, and although he objected to it at the time, he afterwards negotiated it, he was held to have relinquished his lien (d). But where a tonnage freight was payable partly during the voyage, and the remainder by bills at two and four months from the day on which the ship should arrive in the Thames on her return, and there was a

(z) *Thompson v. Small*, 1 C. B. 328; *Ex parte Nyholm*, 43 L. J., Bankcy. 21. Where, as is often the case, a charter freight is to be prepaid by bill, if the bill is dishonoured at maturity the debt revives, but there is no lien against the consignee. *Tamvaco v. Simpson*, 19 C. B., N. S. 453; L. R., 1 C. P. 363. A person who has shipped goods on a general ship cannot, however, demand them back at pleasure without payment of freight; although, by the usage of trade, the merchant may under ordinary circumstances re-demand the goods a reasonable time before the ship sails, on pay-

ing the freight which would become due, and indemnifying the master against the consequences of any bills of lading signed for the goods. See *Tindall v. Taylor*, 4 E. & B. 219.

(a) *Alsager v. St. Katharine's Dock Company*, 14 M. & W. 794.

(b) *Nelson v. The Association for Protection, &c.*, 43 L. J., C. P. 218; *Kirchner v. Venus*, *post*, 394, note (u).

(c) Admitted in *Lucas v. Nockells*, 4 Bing. 729; see as to the analogous case of a shipwright who has worked on credit, *ante*, p. 96.

(d) *Horncastle v. Farran*, 3 B. & Ald. 497.

provision in the charter-party that the ship should after her arrival take her regular turn for delivery in the docks, the Court held that the intention of the parties obviously was that the bills should be delivered before the cargo, and that as they had never been delivered, the lien still existed.

The shipowner loses his lien if he delivers the cargo. He is therefore entitled to refuse to deliver unless the freight is paid. The delivery of the cargo and the payment of freight are concurrent acts, and the master as he delivers the cargo is entitled to demand the payment of a proportional part of the freight (e).

Possession essential to lien.

The lien is not lost by the forcible removal of the master after a capture of the ship; thus, where a ship was captured and the master was taken out, and afterwards she was recaptured, it was held that this removal from possession made no difference, and that the shipowner received the ship on her arrival as trustee for the master, and consequently that his lien for freight still existed (f).

As possession is necessary to a lien at common law, it follows that where the owner absolutely demises the ship, and thus parts with the possession of her, and of her cargo, he can have no lien for her earnings. On this account it often becomes material to consider the construction of the charter-party; and the real question in these cases always is, whether it was the intention of the parties that the owner should part with the control over the ship for a given time, or whether the contract was the ordinary one under which the constructive possession of the ship is preserved. In each case the whole contract contained in the charter-party must be taken together (g), and the result will depend upon the particular expressions used. It is now, however, necessary, that strong and distinct terms should be used before the Courts will put a construction upon the agreement which will deprive the shipowner of his lien. In the earlier cases, the use of express terms of demise was held to afford a nearly decisive criterion of the intention to part with the possession of the

Effect of a demise of the ship.

(e) *Campion v. Colvin*, 3 B. N. C. 17. As to what terms introduced into the bill of lading will amount to a waiver of the lien as against the consignee, see *Gilkinson v. Middleton*, 2 C. B., N. S. 134, *Neish v. Graham*, 8 E. & B. 505, and *Kirchner v. Venus*, 12 Moo. P. C. C. 361, where these cases were disapproved

of. See also *post*, p. 394.

(f) *Ex parte Cheeseman*, 2 Eden, 181.

(g) *Soares v. Thornton*, 7 Taunt. 627; *Newberry v. Colvin*, 7 Bing. 190; *S. C.* 1 Cl. & F. 283; *Belcher v. Capper*, 4 M. & Gr. 502; *Dean v. Hogg*, 10 Bing. 345; see also *post*, Chap. VI., Part II., STOPPAGE IN TRANSITU.

ship (*h*). But in some of the later cases the owner's lien has been supported, notwithstanding such expressions, where in the other parts of the contract language inconsistent with that intention was found; such, for instance, as stipulations showing that the payment of the hire was to be either precedent to, or concomitant with, the delivery of the goods (*i*); or providing expressly for the preservation of the lien (*j*).

The mere use, therefore, of words of demise, although often material, does not necessarily show that the intention of the owner is to transfer the actual possession of the ship; and, on the other hand, the charter-party may have this effect, although no words of demise have been used (*k*). The fact of the owners appointing the master does not afford a strong presumption that they intend to retain possession of the vessel; for it is an almost invariable usage for the owners themselves, although they let out the ship upon freight to a charterer, to appoint the captain and crew; since the chartering of a vessel is not so much the chartering of the hull, as of a ship in a state fit for the purposes of mercantile adventure (*l*). Where a ship was chartered to the commissioners of the transport service on behalf of the Crown, the owners providing the master and crew, but the terms of the charter-party showed that the whole use of the ship was to be vested in the Crown, and that the owners were not to interfere with it, it was held, that, looking at the terms of the charter-party, coupled with the whole nature of the service, a temporary ownership passed to the Crown (*m*).

To what goods
lien extends.

The shipowner's lien extends to every part of the merchandize belonging to the same person and under the same consignment,

(*h*) See the judgment of Tindal, C.J., in *Belcher v. Capper*, 4 M. & Gr. 541; *Hutton v. Bragg*, 7 Taunt. 14; *Saville v. Champion*, 2 B. & A. 503.

(*i*) *Birley v. Gladstone*, 3 M. & S. 205; *Tate v. Meek*, 8 Taunt. 280; *Yates v. Meynell*, *ib.* 302; *Yates v. Railston*, *ib.* 293; *Faith v. East India Company*, 4 B. & A. 630; *Christie v. Lewis*, 2 B. & B. 410.

(*j*) *Small v. Moates*, 9 Bing. 574. If such a provision is inserted, the lien is preserved, although the effect of the contract may be to vest the possession in the charterer. *S. C.* See also *Gledistanes v. Allen*, 12 C. B. 202, and the cases cited *post*, pp. 393, 394. The words "without prejudice to the char-

ter-party" do not preserve the lien. *Shand v. Sanderson*, 4 H. & N. 381.

(*k*) *Newberry v. Colvin*, 7 Bing. 190.

(*l*) See the judgment in *Newberry v. Colvin*, *ubi supra*.

(*m*) *The Trinity House v. Clark*, 4 M. & S. 228. See further as to what terms show an intention to part with the possession of the ship, *Fletcher v. Braddick*, 2 N. R. 182; *Parish v. Crawford*, 2 Str. 1251; *Vallejo v. Wheeler*, 1 Cowp. 143; *Dean v. Hogg*, 10 Bing. 351; *Reeve v. Davis*, 1 A. & E. 312; *Fenton v. Dublin Steam Packet Company*, 8 A. & E. 835; *Meikleroid v. West*, 1 Q. B. D. 428; *Omoa Coal, &c. Company v. Huntley*, 2 C. P. D. 464.

for the freight of the whole (*n*); and where a sum, regulated by the tonnage of the ship, is payable by the charterer for her use, the lien is not confined to the charterer's goods, but it extends also over goods consigned to others (*o*). Where goods were put on board, which had been purchased on account of the charterer, but as he was indebted to the persons who shipped them they were consigned to the agents of the shippers, it was held, that as between the owner of the ship and the agents, the goods must be considered as the goods of the charterer, and liable to his lien for the freight due under the charter-party (*p*).

Where a ship chartered at a lump sum is put up as a general ship and bills of lading are signed at a rate different from the chartered freight, the shipowner has a right of lien against the charterers for the charter freight, and against the indorsees of the bills of lading for the bill of lading freight (*q*).

The lien exists as against sub-freighters to the extent of the freight they have contracted to pay, although the ship be employed by the freighter as a general ship; but where the bills of lading mention a less rate of freight than the charter-party the owner can only retain the goods, as against sub-freighters who have no notice of the charter, for the freight named in their bills of lading (*r*).

For what amount of freight it exists.

Where, however, the holders of the bills of lading of part of the goods were only the correspondents of the charterers, under advance against the goods, and were not in the position of *bond fide* indorsees for value of the bills of lading, and the charter provided for the payment of a lump freight, and that the master might sign bills of lading at any rate of freight without prejudice to the charter, it was held that the shipowners had, against such

(*n*) *Lodergreen v. Flight*, cited 6 East, 622.

(*o*) *Campion v. Colvin*, 3 B. N. C. 17.

(*p*) *Faith v. East India Company*, 4 B. & A. 630.

(*q*) See *Marquand v. Banner*, 6 E. & B. 232; the judgment in *Schuster v. McKellar*, 7 E. & B. 704; *Gilkison v. Middleton*, 2 C. B., N. S. 134; and *Neish v. Graham*, 8 E. & B. 565; and per Lord Chalmersford, in *M'Lean v. Fleming*, L. R., 2 Sc. & D. 133; and see *supra*, p. 389.

(*r*) *Faith v. East India Company*, *ubi supra*; *Mitchell v. Seafie*, 4 Camp. 298; *Paul v. Birch*, 2 Atk. 261; see also

Mitchenson v. Begbie, 6 Bing. 190; *Zwilchenbart v. Henderson*, 9 Ex. 722; *Brown v. North*, 8 Ex. 1; *Foster v. Colby*, 3 H. & N. 705; *Gilkison v. Middleton*, 2 C. B., N. S. 134; *Neish v. Graham*, 8 E. & B. 505; *Shand v. Sanderson*, 4 H. & N. 381; and *Santos v. Brice*, 6 H. & N. 290. In *Fry v. The Chartered Mercantile Bank of India*, L. R., 1 C. P. 689, the charter contained the words "the ship to have a lien on cargo for freight," and the bill of lading "freight payable as per charter-party." This was held to give a lien only for the bill of lading freight.

indorsees, a lien upon the goods represented by the bills of lading for the entire lump freight (s). In a later case, a charter-party was negotiated for a charterer by an agent. The charterer engaged to pay a lump freight for a voyage from London to the coast of Africa and back, "payable on correct delivery of return cargo, in cash, less advances in Africa and two months' discount," and the charter contained also the following stipulation,—“the master to sign bills of lading at any rate of freight, without prejudice to this charter-party.” The ship sailed to Africa, discharged her cargo, and afterwards returned to London under the charter. The charterer shipped on the return voyage some oil on his own account for London, for which the master signed a bill of lading, making it deliverable to the agent or assigns, “he or they paying freight for the said goods as usual.” The charterer indorsed this bill of lading to the agent in part payment of advances made by him on the purchase of the outward cargo. It was held, under these circumstances, that the agent must stand on the charterer's title, both because he was his agent, and because he had notice of the terms of the charter, and that the shipowner was entitled to a lien on the oil for the entire charter freight (t).

Lien does not exist for payment not in the nature of freight.

Where a bill of lading stated in the margin that the freight was to be paid at the port of shipment at or within a certain time from the sailing of the ship, the vessel lost or not lost, it was held in the Privy Council that this sum, although called freight, was really only money paid for taking the goods on board and undertaking to carry them, and that the shipowner had no right of lien in respect of the goods, by reason of the money being unpaid; but that the master was bound to deliver them to the assignee of the bill of lading, although they were deliverable by its terms to the shipper's orders or assigns, “he or they paying freight for the goods as per margin” (u).

(s) *Gledstanes v. Allen*, 12 C. B. 202.

(t) *Kern v. Deslandes*, 10 C. B., N. S. 206. See also *Shand v. Sanderson*, *ubi supra*; and *Kirchner v. Venus*, 12 Moo. P. C. C. 361. Where a master withheld a cargo improperly, claiming a sum of money as lump freight and refusing to deduct average, or to give such particulars within his knowledge as would enable the holder of the bill of lading to apportion it, the Court of Admiralty held (the vessel having been arrested by the assignee of the bill of

lading), that the owners were liable in that Court for the master's breach of duty, under s. 6 of the Admiralty Court Act, 1861, (24 Vict. c. 10). *The Norway*, Br. & L. 377.

(u) *Kirchner v. Venus*, 12 Moo. P. C. C. 361, where *Gilkison v. Middleton* and *Neish v. Graham* were disapproved of so far as these decisions dealt with this question, and the earlier case of *How v. Kirchner*, 11 Moo. P. C. C. 21, was upheld. See also *Nelson v. The Association for Protection*, &c., 43 L. J., C. P. 218.

To preserve the shipowner's lien, the goods, apart from any statute whereby his right is extended, must remain in his custody, actual or constructive, and where, at a foreign port, the consignee is absent or unwilling to receive a cargo consigned to him, the master may find a difficulty in landing and warehousing it in such a manner as to retain his lien (*x*). To obviate this difficulty with reference to cargoes coming to this country, and for the convenience of trade, statutes have from time to time been passed whereby goods might be landed and placed in bonded warehouses, without the payment of customs' duty, expressly reserving the shipowner's right of lien. They provided that when goods were so landed they should continue liable to the same claims for freight as they were subject to whilst on board, and the proprietors of bonded warehouses were directed, upon due notice to them, to detain goods in their possession until the freight due for their carriage was paid, or until a deposit had been made by the owners or consignees of the goods equal in amount to the claim made for freight (*y*).

Preservation of lien under earlier Warehousing Acts.

Some of these enactments have been repealed (*z*), and the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), has substituted for them the following important provisions with reference to the delivery of goods and the shipowner's lien for freight.

By sect. 67 of this act it is provided, that where the owner of any goods, imported from foreign parts into the United Kingdom, fails to make entry of them, or land them, or take delivery of them (*a*), and to proceed therewith with all convenient speed

Preservation of lien for freight under the Merchant Shipping Act, 1862.

(*x*) See per Willes, J., in *Meyerstein v. Barber*, L. R., 2 C. P. 54; *Mors le Blanch v. Wilson*, L. R., 8 C. P. 227.

(*y*) See 8 & 9 Vict. c. 91, s. 51; 3 & 4 Will. 4, c. 57, s. 47; 6 Geo. 4, c. 112, s. 45; the Sufferance Wharfs Act, 11 & 12 Vict. c. xviii., and *Meyerstein v. Barber*, *ubi sup.* By the 7 & 8 Vict. c. 31, goods may be carried inland and placed in bonded warehouses at Manchester, subject to the regulations made by the Commissioners of Customs, and to the same conditions as those under which goods were, before this act, placed in other bonded warehouses. See also the 23 & 24 Vict. c. 36, an act to authorize the appointment and approval of places for the warehousing of goods for the security of duties of customs.

(*z*) The M. S. Act, 1862, has repealed s. 51 of the 8 & 9 Vict. c. 91. See s. 2 of the first-mentioned act and the Schedule Table (A).

(*a*) The words "fails to take delivery" need not be by wilful default of the cargo owner. The shipowner is at liberty to load the goods whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances (such as a *bond fide* dispute as to the amount due for freight), whether the latter is to blame or not. If, however, the master wilfully inserts in his notice, under sect. 63, a sum in excess of that for which he had a lien, the detention of the goods is wrongful and actionable. *The Energie*, L. R., 6 P. C. 306.

by the times mentioned in that respect in the act, the shipowner may make entry of and land, or unship the goods, as follows (b) :—

- (1.) If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed.
- (2.) If no time for the delivery of the goods is expressed in the charter-party, bill of lading or agreement, then at any time after the expiration of seventy-two hours (exclusive of a Sunday or holiday), after the report of the ship.
- (3.) If any wharf or warehouse is named in the charter-party, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed, and if they can be conveniently received there, the shipowner in landing them, by virtue of these provisions, is bound to cause them to be placed on this wharf or in this warehouse.
- (4.) In other cases the shipowner in landing goods under these provisions must place them on a wharf or in a warehouse where goods of a like nature are usually placed. If the goods, however, are dutiable, the wharf or warehouse must be one duly approved by the Commissioners of Customs for the landing of dutiable goods.
- (5.) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or to take delivery of them (c) he may do so, and his entry is then to be preferred to any entry which may have been made by the shipowner.
- (6.) If any goods are, for the purpose of convenience in assorting them, landed at the wharf where the ship is

(b) Under this act the word "goods" includes every description of wares and merchandize; the words "owner of goods," include all persons for the time being entitled, either as owners or agents, to the possession of goods, subject, in the case of any lien, to the lien; and the word "shipowner" includes the master of the ship, and any other person authorized to act as agent for the owner, or entitled to receive the freight, demurrage, or other charges payable in respect of the ship. See

s. 66.

(c) This and the provision contained in sub-sect. 7 is divisible. If, therefore, the goods owner, although not ready to take the first portion of goods consigned to him, is ready to take the remainder, the shipowner, unless he would be prejudiced by so doing, is bound to deliver them; *Wilson v. The London, Italian and Adriatic Steam Navigation Company*, L. R., 1 C. P. 61.

discharged, and the owner of the goods at the time of the landing has made entry and is ready and offers to take delivery of them and to convey them to another wharf or warehouse, the goods must be assorted at landing, and, if demanded, must be delivered to the owner within twenty-four hours after assortment; and the expense of the landing and assortment must be borne by the shipowner.

- (7.) If at any time before the goods are landed or unshipped the owner of them has made entry for the landing and warehousing of them at any wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery of them (*d*), and the shipowner has failed to make delivery and has also failed at the time of the offer to give the goods owner correct information of the time at which the goods can be delivered, then the shipowner is bound, before landing or unshipping the goods, to give to the owner of the goods, or of the wharf or warehouse, twenty-four hours' notice in writing of his readiness to deliver the goods, and, if he lands or unships them without such a notice, he must do so at his own risk and expense (*e*).

By sect. 68 of the Merchant Shipping Act Amendment Act, 1862, it is also provided, that if when any goods are landed from any ship and placed in the custody of any wharf or warehouse owner, the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight, or other charges, payable to the shipowner, to an amount to be mentioned in the notice, the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing; and the wharf or warehouse owner must retain them until this lien is discharged,

(*d*) The goods owner, to entitle himself to notice under this section, must at the time of his offer be actually ready to take delivery; *Beresford v. Montgomerie*, 17 C. B., N. S. 379. See also in this case what is a sufficient compliance with the requirement to give the goods owner correct information of the time at which the goods can be delivered.

(*e*) The word "wharf" includes all wharves, quays, docks and premises upon which goods, when landed from ships, may be lawfully placed. The word "warehouse" has a meaning equally wide. The expressions "wharf owner" and "warehouse owner," mean the occupiers of wharves or warehouses. See s. 66.

and if he fails so to do, must make good to the shipowner any loss thereby occasioned to him (f).

By sect. 69, upon the production to the wharf or warehouse owner of a receipt for the amount claimed as due, and delivery to him of a copy of it, or of a release of freight from the shipowner, the lien is to be discharged.

By sect. 70 the lien may also be discharged by the owner of the goods, if he deposits with the wharf or warehouse owner a sum equal to the amount claimed by the shipowner; but this is not to prejudice any other remedy which the shipowner may have for the recovery of the freight.

By sect. 71, if the person making such deposit does not, within fifteen days after making it, give to the wharf or warehouse owner notice in writing to retain it, stating in the notice the sum, if any, which he admits to be payable to the shipowner, or that he does not admit any sum to be due, the wharf or warehouse owner may, at the expiration of the fifteen days, pay over the sum so deposited to the shipowner, and by this payment he is discharged from all liability.

By sect. 72, if the depositor duly gives such a notice as is required by the statute, the wharf or warehouse owner is bound immediately to apprise the shipowner of it, and to pay or tender to him, out of the sum deposited, the amount admitted to be payable. He must retain the balance, or, if no sum is admitted to be payable, the whole sum deposited, for thirty days from the date of the notice, and at the expiration of that period he may pay over the money in his hand to the goods owner, unless legal proceedings have been in the meantime instituted by the shipowner against the goods owner, and notice in writing of them has been served on the wharf or warehouse owner.

By sect. 73, if the lien is not discharged, and no deposit is made, the wharf or warehouse owner may, and, if required by the shipowner, must, at the expiration of ninety days from the time when the goods were placed in his custody (or, if the goods are of a perishable nature, at such earlier period as he in his discretion may think fit) sell the goods for home use or exportation, or so much of them as may be necessary to satisfy the charges sanctioned by the act. This sale must be by public auction.

By sect. 74, before the sale the wharf or warehouse owner

(f) As to the effect of claiming an excessive sum, see *ante*, p. 395, note (a).

must give notice of it by advertisement in two newspapers circulating in the neighbourhood, or in a daily newspaper published in London and in a local newspaper, and if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharf or warehouse owner, or is otherwise known to him, he is bound to give notice of the sale to the goods owner by letter sent by post; but the title of a *bond fide* purchaser is not invalidated by the omission to send notice, nor is any purchaser bound to inquire whether notice has been sent.

By sect. 75, in all cases of sale the wharf or warehouse owner must apply the money received from the sale as follows, and in the following order :

1. If the goods are sold for home use, in payment of any customs or excise duties owing in respect of them :
2. In payment of the expenses of the sale :
3. In the absence of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their charges, in payment of the rent, rates, and other charges due to the wharf or warehouse owner in respect of the goods :
4. In payment of the amount claimed by the shipowner as due for freight or other charges in respect of the goods :
5. But in case of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their charges, then these charges shall have priority according to the terms of the agreement :

and the surplus, if any, must be paid to the owner of the goods.

By sect. 76 of the Merchant Shipping Act Amendment Act, 1862, whenever goods are placed in the custody of a wharf or warehouse owner under the authority of the statute, the wharf or warehouse owner is entitled to rent in respect of them; he is also entitled from time to time, at the expense of the goods owner, to do all such reasonable acts as in the judgment of the wharf or warehouse owner are necessary for the proper custody and preservation of the goods, and he is entitled to a lien on the goods for the rent and expenses.

By sect. 77 it is provided, that nothing in the act is to compel any wharf or warehouse owner to take charge of any goods which he would not be liable to take charge of if the statute

had not passed; nor is he bound to see to the validity of any lien claimed by any shipowner under the act.

And in sect. 78 is contained a general provision, that nothing in the act contained is to take away or abridge any powers given by local acts to harbour trusts, bodies corporate and persons, by which they are enabled to expedite the discharge of ships or the landing or delivery of goods.

Nor are the rights or remedies given by any local act to any shipowner or wharf or warehouse owner to be taken away or abridged.

**SET-OFF
AGAINST
FREIGHT.**

In an action for freight the defendant pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was being earned he assigned it to a third person for value, of which the defendant before the debt became due had notice, and that the plaintiff was only suing as trustee. This replication was held to be no answer to the plea (*f*).

**JURISDICTION
OF ADMIRALTY
DIVISION IN
CASES OF
DAMAGE TO
CARGO.**

By the Admiralty Court Act, 1861, s. 6 (*g*), it is provided that the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract, on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales (*h*).

The words "breach of contract" have been held to be limited to a breach of a contract contained in a bill of lading (*i*), and they do not give jurisdiction in respect of a breach of charter-party committed before the goods were put on board (*j*). The wilful abandonment of a ship at sea has been held to constitute a cause of action within the act (*k*).

The word "carried" is not used in the sense of imported, and the statute applies where the goods are only incidentally brought

(*f*) *Watson v. Gabriel*, 4 B. & S. 243.

(*g*) 24 Vict. c. 10, s. 6, Appendix, p. ccxiv.

(*h*) *Ex parte Michael*, L. R., 7 Q. B. 658.

(*i*) *The Pieve Superiore*, L. R., 5 P. C. 482.

(*j*) *The Dannebrog*, L. R., 4 A. & E.

386.

(*k*) *The Princess Royal*, L. R., 3 A. & E. 41. As to other breaches held to be within the act, see *The Ironsides*, Lush. 458; *The St. Cloud*, Br. & L. 4; *The Norway*, *ibid.* 227; *The Bahia*, *ibid.* 61; *The Felix*, L. R., 2 A. & E. 273; *The Chasca*, 4 A. & E. 446.

into a port in England (*l*). The statute is to be construed in connection with the Bill of Lading Act (*m*), and the property in the goods must pass to the assignee in order to entitle him to bring an action by virtue of the statute (*n*).

The act gives a statutory right to proceed against the ship, but no lien attaches prior to the institution of the suit (*o*).

The County Courts Admiralty Jurisdiction Act, 1868, conferred upon county courts having admiralty jurisdiction as to any claim for damage to cargo in a cause in which the amount claimed did not exceed 300*l*. It was decided on this act that it did not confer a more extensive jurisdiction than that exercised by the Court of Admiralty (*p*).

COUNTY
COURTS
ADMIRALTY
JURISDICTION.

But by the County Court Admiralty Jurisdiction Amendment Act, 1869 (*q*), it was enacted that any county court appointed to have admiralty jurisdiction should have jurisdiction to try and determine the following causes :

- (1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds :
- (2.) As to any cause in respect of any such claim or claims as aforesaid, but in which the amount claimed is beyond the amount limited as above mentioned, when the parties agree, by a memorandum signed by them or by their attorneys or agents, that any county court having admiralty jurisdiction, and specified in the memorandum, shall have jurisdiction.

In the case of *The Cargo ex Argos* (*r*), the Judicial Committee of the Privy Council decided that this latter enactment conferred upon County Courts having admiralty jurisdiction a more extended jurisdiction than that exercised by the Admiralty Court, and that a county court having admiralty jurisdiction might entertain a suit against a ship arising out of a charter-

(*l*) *The Bahia*, Br. & L. 61; *The Piece Superiore*, L. R., 5 P. C. 482.

(*m*) 18 & 19 Vict. c. 111, Appendix, p. clxxvi.

(*n*) *The Freedom*, L. R., 3 P. C. 594.

(*o*) *The Piece Superiore*, *supra*.

(*p*) 31 & 32 Vict. c. 71, s. 3, Appendix, p. cccviii; *The Douce*, L. R., 3 A. & E. 135.

(*q*) 32 & 33 Vict. c. 51, s. 2, Appendix, p. cccvii.

(*r*) L. R., 5 P. C. 134.

party. This decision has lately been followed by the Court of Appeal (s).

A cause pending in a county court having admiralty jurisdiction may be transferred to the Admiralty Division, notwithstanding that the cause may relate to matters which the Admiralty Division could not have entertained in the first instance (t).

MEASURE OF
DAMAGES FOR
BREACH OF
THE CON-
TRACT OF
AFFREIGHT-
MENT.

A charter-party sometimes contains some such words as the following:—"Penalty for non-performance, estimated amount of freight." Such a stipulation has ordinarily no effect. The actual damage sustained, and no other damage, can be recovered for breach of charter-party, unless (as is seldom the case) the parties distinctly agree that a named sum shall be regarded as liquidated damages in case of breach (u).

In an action against a shipowner for unreasonable delay in the carriage of goods on a voyage, the consignee of the goods is not entitled to recover damages by reason of a fall in the market value of the goods between the time when the goods ought to have been delivered and the time when they were delivered (x). Where the shipowners received at Glasgow cases of machinery, to be carried to a port abroad and there delivered to the plaintiffs, the machinery was, as the plaintiffs at the time of shipment knew, intended for the erection of a saw-mill: on the arrival of the ship at her destination default was made in the delivery of one of the cases, and the plaintiffs were obliged to send to England to replace the missing

(s) *Brown v. The Owners of the Alina*, 5 Ex. D. 227. For long there was a conflict of authority on this point. See *Simpson v. Blues*, L. R., 7 C. P. 290; *Gunnsted v. Price*, L. R., 10 Ex. 65.

(t) The County Courts Admiralty Jurisdiction Act, 1868, s. 6; *The Swan*, L. R., 3 A. & E. 314.

(u) "Such a clause is not the absolute limit of damages on either side: the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the damage actually sus-

tained."—Abbott on Shipping, 5th ed. pt. iii. ch. i. s. 6, p. 170. See *Harrison v. Wright*, 13 East, 343; *Sparrow v. Paris*, 7 H. & N. 594; 31 L. J., Ex. 137; *Winter v. Trimmer*, 1 W. Bl. 395. And see *Goddard v. Gray*, L. R., 6 Q. B. 139, where the matter is incidentally considered.

(x) *The Parana*, L. R., 1 P. D. 452, 2 P. D. 118. But in an earlier case in which the shipowner neglected to have his ship ready to load a cargo of coals at the specified time, and the merchant was obliged to procure other vessels to carry the coal and to pay an additional price for the coal, it was held that the merchant was entitled to recover damages in respect of the additional price so paid. *Featherston v. Wilkinson*, L. R., 8 Ex. 122.

machinery; it was held that the measure of damages was the cost of replacing the lost articles at the port of discharge, with interest until judgment, by way of compensation for the delay (*y*).

Where the ship arrives in port and is ready to deliver, and the consignee makes default in naming a wharf, the shipowner is entitled as damages to the net amount he would have received if the cargo had been duly delivered (*z*), and this notwithstanding that after default the ship by reason of an arrest under admiralty process becomes unable to deliver the cargo (*a*). Where the master is bound by charter to sign clean bills of lading and refuses to do so, but receives and carries the goods and delivers them in good condition, nominal damages only can be recovered (*b*).

In a case where the plaintiff's vessel was chartered to proceed with outward cargo to Puerto Cabello, and then to proceed to Maracaibo to load a homeward cargo, it was afterwards agreed between the plaintiff and the charterer that the plaintiff should have the option of sending a portion of the outward cargo to Maracaibo, and that any expense the ship might incur in consequence of this should be borne by the charterer. The charterer shipped a full cargo, a portion for Puerto Cabello and a portion for Maracaibo, and a separate manifest was made out for each portion of the cargo. On the arrival of the ship at Puerto Cabello, the officers of the Customs prohibited the discharge of the cargo there, and alleged that it was not in accordance with the law of Venezuela to have separate manifests, and a fine of 500 dollars was imposed upon the master for such alleged breach of the law. The master was unable to pay the fine, and in consequence his ship was detained for a long time, and he incurred costs and expenses. It was held, that the costs and expenses were not such as were contemplated by the agreement, and that the plaintiff was not entitled to recover, against the charterer, anything in respect of them (*c*).

(*y*) *British Columbia Company v. Nettleship*, L. R., 3 C. P. 490.

(*z*) *Smith v. McGuire*, 3 H. & N. 554.

(*a*) *Stewart v. Rogerson*, L. R., 6 C. P. 424.

(*b*) *Jones v. Hough*, 5 Ex. D. 115.

(*c*) *Sully v. Duranty*, 33 L. J., Ex. 319.

CHAPTER VI.

CONTRACT OF AFFREIGHTMENT AND ITS INCIDENTS.

PART II.

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<i>Of Indorsement of Bill of</i>		<i>Average Loss</i>	432
<i>Lading</i>	421	<i>Deck Cargoes</i>	433
<i>Of Countermand of Delivery</i>	422	<i>Damage done in Action</i>	433
<i>Of Right to refuse to allow</i>		<i>Loss must be for general</i>	
<i>Transit to begin</i>	423	<i>Safety</i>	434
<i>Of Part Payment and Part</i>		<i>What Articles contribute</i>	434
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DEMURRAGE. DEMURRAGE, properly so called, is the sum which is fixed by the contract of carriage as a remuneration to the shipowner for the detention of the ship beyond the number of days allowed for loading or unloading (a). The amount is usually calculated at so much per day; and the number of days during which the ship may be detained on demurrage is also generally limited by

(a) Where no time is named there is an implied contract that the ship should be discharged in a reasonable time. *Fowler v. Knoop*, 4 Q. B. D. 299. Whenever in the charter-party it is agreed that a specified number of days shall be allowed for loading, commonly called "lay days," and that it shall be lawful for the freighter to detain the vessel for that purpose a

further specified number of days, on payment of demurrage, commonly called demurrage days, this constitutes a stipulation on the part of the freighter that he will not detain the ship for the purpose of loading beyond the demurrage days. *Ford v. Cotterworth*, L. R., 4 Q. B. 127; 5 Q. B. 544; *Nelson v. Dahl*, per Brett, L. J., 12 Ch. D. at p. 583.

the contract (b). When the ship is detained by the freighter beyond the days of demurrage, a claim arises for unliquidated damages for the subsequent detention, and the rate which is agreed upon for the demurrage becomes *prima facie*, but not necessarily, the measure of this compensation (c). It sometimes occurs that no demurrage is mentioned in the charter or bill of lading, but in these cases damages for detention or for breach of some provision as to delay in loading or unloading may become payable, and these damages are not uncommonly, though inaccurately, spoken of as demurrage (d).

Although the liability to pay demurrage depends almost in every case upon the terms of the particular contract, yet there are some general principles which regulate contracts of this description which require notice.

General rules
as to its
payment.

The right to demurrage or to damages for detention, whether at the port of loading or at the port of discharge, cannot arise until the shipowner has placed his vessel at the disposition of the charterer at the place of loading or discharge according to the terms of the contract of affreightment. The ship must be at the place named in the contract of affreightment, and must be ready, so far as she is concerned, there to load or unload as the case may be, before the obligation of the charterer to load or unload attaches; and whatever period the charterer may be entitled to occupy in loading or unloading must be reckoned from that date.

Commence-
ment of obli-
gation to load
or unload.

If the place named is a port and ships customarily load or unload only at some particular parts of the port, the obligation of the merchant to load or unload does not commence until the ship has arrived at some part of the port where vessels usually load or unload, because it must be taken that that is the place which by custom is intended by the words in the charter-party (e). But if the charter-party describes a more limited

(b) 1 Beawes, Lex Merc. 197; Smith, Merc. Law, 271. The delay itself is also sometimes called demurrage.

(c) *Randall v. Lynch*, 12 East, 179; *Moorsom v. Bell*, 2 Camp. 616. See as to demurrage when the delivery of the outward cargo is prevented, and the ship returns with it to the port of loading, *Christy v. Row*, 1 Taunt. 300.

(d) *Cauthron v. Trickett*, 15 C. B., N. S. 754; 33 L. J., C. P. 182.

(e) *Brereton v. Chapman*, 7 Bing. 559; *Kell v. Anderson*, 10 M. & W. 498. In all these cases, it seems to be open to the consignee to show that by a custom of the port of discharge the lay days commence only when the ship has arrived at a particular place in the port. See *Norden Steam Company v. Dempsey*, 1 C. P. D. 654, where the shipowner, although he was a foreigner, was allowed to give in evidence a custom of the port of

space, as a dock or quay, then the liability of the charterer to load or unload does not commence until the ship has arrived at the dock or quay named, and is then ready to perform her part in delivering the cargo (*f*).

In cases where it has been provided that a ship shall discharge at a particular place in a port, or wharf, or as near thereto as she can safely get, it has been held that the liability of the charterer to unload does not commence until the vessel arrives at the place named, if the delay in getting to it is occasioned only by the ordinary tides and course of navigation (*g*). But where a ship is chartered to proceed to a private dock, or so near thereto as she may safely get, and she is unable to obtain admission to the dock, not by reason of any of the usual accidents of navigation, but by reason of the regulations of the dock, which render it impossible for the ship to gain admission without such delay as would, having regard to the interest of the parties to the adventure, be wholly unreasonable, the ship-owner is to be considered as prevented from entering the dock by a permanent obstacle, and he may require the charterer to take delivery of the cargo at the nearest convenient place to the entrance of the dock (*h*).

Some difficulty has arisen in cases where, by the stipulations in the charter-party, the ship was required to proceed to a named dock, there to load or unload, and the ship having arrived in the dock, has been ready to unload, but by reason of all the available berths being occupied has been unable to

Liverpool, that the lay days of timber ships commence only on the mooring of the ship at the quay where she is allowed to discharge. In *Brown v. Johnson*, 10 M. & W. 331, it was held that the lay days did not commence until the ship arrived in dock. It seems to have been assumed or proved that the usual place of unloading all ships at the port of discharge was in dock. See per Brett, L. J., *Nelson v. Dahl*, 12 Ch. D. at p. 588. If there are in the named port more places than one where vessels customarily discharge, the charterer has the option of selecting the particular place, and if he exercises his option in due course the voyage cannot be considered at an end until the ship has arrived at the place named by him. But it has been held by the Court of Exchequer Chamber in Ireland, in a case where a vessel was ordered to the port of Newry, and

from the draught of the vessel it was necessary to discharge part of her cargo at a place about ten miles from Newry, but within the port of Newry, that the lay days began to run from the commencement of the discharge. *Caffarini v. Walker*, L. R. Irish, 10 C. L. 190.

(*f*) *Tapscott v. Balfour*, L. R., 8 C. P. 46; and see the judgment of Brett, L. J., in *Nelson v. Dahl*, 12 Ch. D. 568. See also *M'Intosh v. Sinclair*, L. R. Irish, 11 C. L. 456; *Hillstrom v. Gibson*, 8 Sess. Ca., 3rd series, 463; *Dickinson v. Martini*, 1 Sess. Ca., 4th series, 1185. See also *ante*, p. 320, note (*f*).

(*g*) *Parker v. Winlow*, 7 E. & B. 942, and *Bastifell v. Lloyd*, 1 H. & C. 388; *Brown v. Johnson*, 10 M. & W. 331.

(*h*) *Nelson v. Dahl*, 12 Ch. D. 568. But this case is now under appeal.

aff'd 5 C.P. 12.

obtain a berth for loading or unloading without delay; and so the loading or unloading has been delayed beyond the stipulated number of lay days. In nearly all these cases it has been held that the responsibility of providing a berth rests not with the owner, but with the charterer; and although the shipowner is, subject to the considerations already mentioned, responsible for any delay that may occur in getting his vessel into the specified dock, yet, if the ship once enters into the dock and is there ready to discharge, the charterer is responsible for any delay that may occur by reason of there being no berth to receive her (i). But in a recent case, where a ship was chartered to proceed with cargo to "the port of Dundalk quay," and when she arrived at the quay the only berth alongside the quay was occupied by another vessel, and delay occurred before she could obtain that berth, it was held that the obligation of the charterer to unload did not commence until the ship was moored in the berth alongside the quay (k).

(i) See per Bramwell, L. J., *Davies v. McVeagh*, L. R., 4 Ex. 265. In that case, the charterer agreed to load on board the plaintiff's ship a cargo of coals, in one of two specified docks, within a specified number of lay days, and on the 20th November, as a matter of favour granted by the dock authorities, the ship was admitted into one of the named docks; but in consequence of the regulations of the dock she was unable to obtain a berth until the 5th December. It was held, by Brett, L. J., that the lay days commenced from the day when the ship entered the dock, and this ruling was upheld by the Court of Appeal. In *Tapscott v. Balfour*, L. R., 8 C. P. 46, it was agreed by charter-party that the plaintiff's ship should proceed to any Liverpool or Birkenhead Dock as ordered by the defendants, and there load in the usual and customary manner, at the rate of 100 tons per working day. The defendants directed the ship to proceed to the W Dock. In that dock coals were more usually loaded from "tips," though they were not unfrequently loaded from lighters. The ship was ready to enter the dock on the 3rd of July, but by the dock regulations she was not allowed to enter the dock until the 11th of July, but she could not get under the "tips" for some time after she entered the dock, owing to other vessels being in turn before her. It was held, that the lay days commenced

from the time when the ship entered the dock. The following passage in the judgment deserves attention. "The rule is, that when a port is named in a charter, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadsteads where loading usually takes place. If when she arrives there the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all that he was required to do when he has taken his vessel to the usual place of loading in the port." See, however, *Ashcroft v. Crow Orchard Colliery Company*, L. R., 9 Q. B. 540. In the report of this last case, it does not appear clearly what were the exact provisions of the charter-party as to the place of loading. See also *Dall'Oro v. Mason*, 3 Sess. Ca., 4th series, 419. See the observations of Brett, L. J., in *Nelson v. Dahl*, 12 Ch. D. at p. 588. In the last-mentioned case, one of the judges of the Court of Appeal seemed to incline to the opinion that if the place named in the charter-party was a private dock or quay, the voyage ended where the public highway ended, and that the obligation was upon the charterer to procure the admission of the ship into the dock. See the judgment of James, L. J., at p. 603.

(k) *Strahan v. Gabriel*, 26th June,

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12 & 13 D. 87

13

In the
customary
manner.

Where the freighter is bound by the terms of the charter-party to load a cargo "in the customary manner," or in regular and customary turn," no time being mentioned, this means that the freighter shall perform his part of the loading according to the usage of the port, and within a reasonable time or in customary turn, without reference to unforeseen difficulties in procuring the cargo or getting it to the place of loading; and if the loading is delayed beyond a reasonable time by these causes, although beyond his control, the freighter is not excused (1).

1879, tried at Newcastle before Brett, L. J., not reported, but referred to in the judgment in *Nelson v. Dahl*, 12 Ch. D. at p. 590. The ship was chartered to discharge at the "port of Dundalk quay;" she arrived at Dundalk quay, and moored at the quay, that is, her warps were carried to the quay, and she lay alongside a vessel that occupied the only berth alongside the quay. The ship was, so far as she was concerned, ready to discharge, and her master offered to discharge either into lighters or across the vessel which occupied the quay berth, if the charterer would pay for the stage and labour. There was evidence that ships at Dundalk usually discharged alongside the quay. The charterer refused to unload until the ship was moored in the berth alongside the quay, and the unloading of the ship was delayed until the vessel which already occupied the berth alongside the quay completed her loading. Brett, L. J., held, at Nisi Prius, that the obligation of the charterer to unload did not commence until the ship was moored alongside of the quay, and this ruling was upheld by the Queen's Bench Division. But see *La Cour v. Donaldson*, 1 Sess. Ca., 4th series, 912.

(1) *Adams v. The Royal Mail Steam Packet Company*, 5 C. B., N. S. 492; *Fenwick v. Schmalz*, L. R., 3 C. P. 313. See, however, *Harris v. Dreesman*, 23 L. J., Ex. 210. If the ship is to be unloaded in "the usual and customary time," the freighter is not liable to pay for a detention caused merely by the crowded state of the docks. *Rodgers v. Forresters*, 2 Camp. 483; *Burmester v. Hodgson*, *ib.* 488. See observations on the dictum of Mansfield, C. J., in the latter case in *Ford v. Colerworth*, L. R., 4 Q. B. 127.

In *Tapscott v. Balfour*, L. R., 8 C. P. 46, where the words were "load in the usual and customary manner," a

cargo of coals "at the rate of 100 tons per working day," the Court seemed to be of opinion that the words "load in the usual and customary manner" applied only to the mode of loading when the vessel had arrived at the loading berth, and that they had no reference to a detention outside the loading place. See also per Pollock, C. B., in *Lawson v. Burness*, 1 H. & E. 400; and per Brett, L. J., in *Nelson v. Dahl*, 12 Ch. D. at page 588. In *Ashcraft v. Crow Orchard Colliery Company*, L. R., 9 Q. B. 540, the Court expressed an opinion that the words "to be loaded with the usual despatch of the port" imported an absolute obligation on the part of the charterer to load with the usual despatch of the port, and covered the whole period from the time when the vessel at the port was placed at the disposal of the charterer there in a condition to receive her cargo, and that the charterer could not excuse himself from the delay caused by a detention which arose from his having, on the arrival of the ship, as many vessels in the dock as he was entitled to by the regulations.

In *Postlethwaite v. Freeland*, L. R., 4 Ex. D., affirmed by the House of Lords 5 App. Ca. 599, the charter-party provided that the cargo should be taken from alongside at merchant's risk and expense, and should be discharged with all despatch according to the custom of the port. According to the custom of the port, vessels were usually discharged by lighters, but when the plaintiff's ship arrived at the port, in consequence of all the lighters at the port being engaged in discharging other vessels, the charterer was unable to begin his discharge until twenty-four working days had elapsed: it was held that the charterer was not liable for the delay; that he was only bound to use due despatch, having regard to the existing

but see
in the
plaintiff's
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p. 619.

Where by the terms of the charter-party the ship is to deliver the cargo "in the usual and customary manner," the obligation which attaches is only that the merchant and shipowner shall each use reasonable despatch in performing his part, and there is no implied contract that the discharge shall at all events be performed in the time usually occupied at the particular port. Therefore where, owing to a threatened bombardment, the authorities at the port of discharge refused for several days to allow the discharge of cargo to proceed, so that during those days neither party to the contract could perform his part of the contract, it was held that the loss from delay must fall on the shipowner (*m*).

Where a ship was to sail with convoy, and demurrage was to be paid for every day beyond a certain number of days that she should "wait for convoy," this was construed to mean that it was to be paid until the convoy was ready to sail, and not that the freighter was to be discharged on the arrival of the convoy at the port where the ship lay (*n*).

Demurrage ceases on the day of sailing from the port of loading; and if the ship afterwards puts back, owing to contrary winds, and is detained in port by ice or bad weather, the freighter is not liable (*o*). Nor is he liable if the ship, *after she is loaded*, is detained by ice, or by any act of the shipowner (*p*).

Demurrage cannot be claimed for the detention of a ship on account of harbour dues payable by the consignee, as in such a case the captain should pay them and look to the consignee for repayment (*q*).

appliances at the port. But see *Wright v. The New Zealand Shipping Company*, L. R., 4 Ex. D. 165 (*m*).
(*m*) *Ford v. Cotesworth*, L. R., 4 Q. B. 127. See *Cunningham v. Dunn*, 3 C. P. D. 443.

(*n*) *Launoy v. Werry*, 4 Bro. Parl. C. 630.

(*o*) *Jamieson v. Laurie*, 6 Bro. Parl. C. 474.

(*p*) *Barrett v. Dutton*, 4 Camp. 333; *Pringle v. Mollett*, 6 M. & W. 80; *Furnell v. Thomas*, 5 Bing. 188. Special clauses are frequently inserted in charter-parties to meet the contingencies of particular trades. Where the words "detention by ice and quarantine not

to be reckoned as laying-days" were inserted in a grain charter from Sulinah, they were held to include a delay occasioned by the lighters which were bringing the cargo down the river being detained by ice, although the shipowner was ignorant of the circumstances of the port, and although the charterer, by using greater diligence, might have loaded the ship before the navigation was interrupted. *Hudson v. Eds*, L. R., 2 Q. B. 566; affirmed Cam. Scac., L. R., 3 Q. B. 412.

(*q*) *Möller v. Jecks*, 19 C. B., N. S. 332.

Demurrage ceases on the day of sailing.

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Delays caused
by superin-
cumbent
goods, &c.

Where the parties enter into a positive contract that the goods shall be taken out of the ship within a certain number of days from her arrival, this contract must be construed strictly, and demurrage becomes payable for any delay after the ship has arrived at the place stipulated beyond the period fixed upon, which is not owing to the default of the shipowner; even although it may be caused by an accident or impediment over which the freighter has no control; as, for instance, by bad weather (*r*), by the necessity for the removal of superincumbent goods (*s*), by the crowded state of the docks into which the ship has entered (*t*), or by custom house or government restraints or regulations (*u*); and this has been held to be so even although no notice of the ship's arrival has been given to the consignees, or to the indorsees of the bill of lading (*x*). For, although this rule may appear to operate harshly as against the consignees, they might have protected themselves by express stipulation. Where the charterer was not ready to load when the ship's turn came and so eleven days were lost, and when her turn to load came round again she was delayed three more days by wind and a crowded harbour; he was held liable for the fourteen days (*y*). If the delay in unloading is occasioned by an improper interruption by the shipowner, the above rule does not apply, since in such a case the detention is the act of the owner and not of a freighter; but it is not every interference, for however short a time, that will put an end to the obligation of the charterer (*z*).

(*r*) *Thiis v. Byers*, 1 Q. B. D. 244.

(*s*) *Harman v. Gandolphi*, Holt, N. P. C. 35; *Leer v. Yates*, 3 Taunt. 387; *Taylor v. Clay*, 9 Q. B. 713; *Straker v. Kidd and Company*, 3 Q. B. D. 223; *Porteus v. Watney*, *ib.* 534; and see the judgment of Parke, B., in *Kell v. Anderson*, 10 M. & W. 502; the judgments in the Exchequer Chamber in *Erickson v. Barkworth*, 3 H. & N. 894, and the same case in the Court below, *ib.* 601. It is apprehended that the rule laid down in the text is the true one, and that the cases cited above are correctly decided, although Lord Tenterden, in *Dobson v. Droop*, 4 C. & P. 112, ruled differently. It appears to be in all cases a question of construction of the contract as appearing on the charter-party and bill of lading. Possibly in the last-mentioned case (as

in *Rogers v. Hunter*, 2 C. & P. 601), the word "detention" may have been used; from which it may have been inferred that demurrage was to be payable only so long as the ship was willfully detained by the freighter. The insertion of a few words in the charter-party or bill of lading would get rid of all difficulty in this respect.

(*t*) *Randall v. Lynch*, 2 Camp. 352; and see *supra*, p. 405.

(*u*) *Blight v. Page*, 3 B. & P. 295, note (*a*); *Bessey v. Evans*, 4 Camp. 131; *Hill v. Idle*, *ib.* 327.

(*x*) *Harman v. Clarke*, 4 Camp. 159; *Harman v. Mant*, *ib.* 161.

(*y*) *Jones v. Adamson*, 1 Ex. D. 60.

(*z*) *Benson v. Blunt*, 1 Q. B. 870; *Hansen v. Donaldson*, 1 Sess. Ca., 4th series, 1066.

It has been held, that in computing the number of lay days Sundays are to be included, unless working days are expressly mentioned, or are implied by the context (*a*), or there be any custom to the contrary (*b*). In one case the jury were satisfied that such a custom existed in London (*c*). Where no division of a day is stipulated for, a fraction counts as a whole day (*d*).

Mode of computing days.

The contract to pay demurrage, which is contained in the charter-party, is made between the shipowners and the freighters. But where, as is often the case, the bill of lading mentions the demurrage, a consignee who accepts the goods under it may, and generally does, become liable for it on a new contract; his acceptance of the goods under these circumstances being evidence to establish an agreement on his part to pay the demurrage (*e*).

Parties liable to pay demurrage.

Where a cargo was received by an indorsee of a bill of lading, which made the goods deliverable "*against payment of the agreed freight and other conditions, as per charter-party,*" it was held that the jury might infer from these circumstances a contract to pay the demurrage stipulated for by the charter-party (*f*).

These decisions are now of little importance, since by the Bills of Lading Act, 1855 (*g*), s. 1, every consignee of goods named in a bill of lading, and every indorsee to whom the property

(*a*) *Commercial Steamship Company v. Boulton*, L. R., 10 Q. B. 346.

(*b*) *Brown v. Johnson*, 10 M. & W. 331; and *Nieman v. Moss*, 29 L. J., Q. B. 206.

(*c*) *Cochran v. Retberg*, 3 Esp. 121.

(*d*) *Commercial Steamship Company v. Boulton*, *ubi sup.*; *Hough v. Athya*, 6 Scss. Cases, 4th series, p. 961.

(*e*) *Harman v. Gandolphi*, Holt, -N. P. C. 35; *Harman v. Mant*, 4 Camp. 164; and see *ante*, p. 382. A jury may find that such an agreement exists, notwithstanding that the receiver of the goods at the time he received them alleged that he was not liable to pay demurrage. *Wegener v. Smith*, 15 C. B. 285.

(*f*) *Wegener v. Smith*, *ubi sup.*; *Fortous v. Watney*, 3 Q. B. D. 534. The wording of the bill of lading in these cases were peculiar. It also appeared in the former case that the demurrage had accrued by reason of the delay of the indorsee at the port of discharge. In *Smith v. Sieeking*, 4 E. & B. 945, where the words of the bill of lading, under which the goods were received, were "paying for the said goods as

per charter-party," the Exchequer Chamber held, that the indorsee of a bill of lading so framed did not, by receiving the goods at their destination, make himself liable to pay for demurrage at the port of loading according to the rate stipulated in the charter-party; although there was in the charter an express stipulation for a lien on the goods for such demurrage. And where a cargo was shipped under a charter-party by which the charterer was to have a certain number of days for loading and unloading, after which demurrage was to be paid, and the cargo was received by consignees under a bill of lading which contained the words "he or they paying freight as per charter-party," and in the margin "there are eight working days for unloading," it was held that the consignees were not liable for demurrage, although the vessel was detained beyond the time mentioned. *Chappell v. Comfort*, 10 C. B., N. S. 808.

(*g*) 18 & 19 Vict. c. 111, Appendix, p. cxxxvi.

passes upon or by reason of the consignment or indorsement, is subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Cesser clause. It is usual when the charterer contracts as agent, and even when he is a principal it is not unfrequent, to insert a clause in the charter-party providing that his liability shall cease when the cargo is shipped. In such a case the charterer is not liable for demurrage at the port of discharge (*h*). Whether he is exempt from demurrage at the port of loading will depend upon the language of the particular clause adopted. Where the words were, "the charter being concluded by the charterer on behalf of another party resident abroad, all liability of the charterer shall cease as soon as he has shipped the cargo," and no lien was given for demurrage at the port of discharge, it was held that this did not relieve him from liability for delay in loading (*i*). If, however, the words are, "the liability as to all matters and things as well before as after the shipping of the cargo shall cease as soon as they have shipped the cargo," the exemption applies to demurrage accruing both at the port of loading and of discharge (*k*). So where the words are, "charterer's liability to cease when the ship is loaded," the captain having a lien upon the cargo for freight and demurrage (*l*).

In the above cases great stress was laid upon the provision whereby a lien is given to the shipowner, and there has been a strong tendency to treat the cesser of the liability and the operation of the lien as correlative, so that the liability of the charterer is to cease only so far as the shipowner has a lien for demurrage, unless the words used clearly express a contrary intention (*m*). Where a charter was silent as to lay or demurrage

(*h*) *Oglesby v. Yglesias*, E. B. & E. 930.

(*i*) *Christopherson v. Hanson*, L. R., 7 Q. B. 509; *Pederson v. Lotings*, 5 W. R. 290, and cases cited *ante*, pp. 335, 336. Where the clause ran "all liability shall cease as soon as the cargo is shipped, loading excepted," it was held that the loading excepted extended to delay in loading, and that the charterers remained liable for delay although they had loaded a complete cargo. *Lister v. Van Haansbergen*, 1 Q. B. D. 269.

(*k*) *Milvain v. Perez*, 3 E. & E. 495.

(*l*) *Francesco v. Massey*, L. R., 8 Ex.

101; *Kisch v. Cory*, L. R., 10 Q. B. 553. The principle acted upon in these cases has been held to apply although the consignee is the agent of the charterers and consignees who are exporting for their own use. *Sanguinetti v. Pacific Steam Navigation Company*, 2 Q. B. D. 238. See also *French v. Gerber*, 2 C. P. D. 247, where the exoneration clause was held to apply to omissions by the charterers to give orders as to the port of discharge, and to giving orders to discharge at an unsafe port, whereby the shipowner was delayed.

(*m*) Where the language of the

days, but contained a clause that the charterer's liability should cease upon shipping the cargo, provided the same should be worth the freight on arrival, the captain having an absolute lien on it for demurrage, and a delay occurred in loading, it was held that, as the lien for demurrage could there apply only to detention, as distinguished from demurrage properly so called, the charterers were exempt from liability (*n*). In a more recent case where the charter contained no clause for demurrage at the port of lading, merely providing that the cargo should be loaded in the "customary manner," but as to the port of discharge provided for working days and demurrage, and that the ship should have an absolute lien on cargo for freight and demurrage, "the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship:" it was held that the exemption of the charterer and the lien clause applied only to demurrage at the port of discharge, and not to damage for delay at the port of loading (*o*).

The master cannot sue for demurrage in his own name unless it is mentioned in the bill of lading (*p*), or unless the bill of lading contains an express stipulation on the breach of which the payment of demurrage is implied, as where it provides that the vessel shall take her regular turn in unloading (*q*).

When master may sue for demurrage.

A claim for demurrage seems to be within the jurisdiction of a County Court having admiralty jurisdiction (*r*).

County Court admiralty jurisdiction.

Stoppage *in transitu* is a subject which belongs properly to the general mercantile law; but as questions arising out of this right often render it difficult for shipowners and masters to ascertain to whom goods are to be delivered, it is necessary to notice shortly the principles by which this right is regulated.

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charter is such that the charterer is clearly exempted from both antecedent and future liabilities, the question of lien is immaterial, but if the words admit of either construction the Court will lean to the more equitable view, and hold that liability as to antecedent breaches is to cease, only so far as an equivalent lien is given. *French v. Gerber*, 1 C. P. D. 737.

(*n*) *Bannister v. Breslauer*, L. R., 2 C. P. 497. See the observations on this case in *Gray v. Carr*, and in

Lockart v. Falk, *post*.

(*o*) *Lockart v. Falk*, L. R., 10 Ex. 132. See also *Gray v. Carr*, L. R., 6 Q. B. 622.

(*p*) *Brouncker v. Scott*, 4 Taunt. 1; *Evans v. Forster*, 1 B. & Ad. 118; *Jesson v. Solly*, 4 Taunt. 52; *ante*, p. 112, and the cases cited above.

(*q*) *Cawthron v. Trickett*, 15 C. B., N. S. 754.

(*r*) *Brown v. Owners of the Alina*, 5 Ex. D. 227; *The Cargo ex Argos*, L. R., 5 P. C. 134. See *ante*, p. 401.

Wherein
right consists.

The right of stoppage *in transitu* is a right conferred on the unpaid vendor of goods to stop them, on the bankruptcy or insolvency of the vendee, before they have reached his actual or constructive possession; and to resume possession of them, so as to put himself in the same position as if he had not parted with them. The origin of the right is doubtful (*g*); and the effect of its exercise on the contract of sale is not clearly settled (*h*); but it rests obviously on a broad principle of justice. It was formerly enforced both at common law and in equity (*i*), and it has been recognized in many of the foreign systems of law (*k*).

The very definition of this right implies that there must be some intermediate agency between the vendor and the vendee; there must be a *transit*,—a passage of the goods from the one to the other,—and this conveyance is generally effected by the agency of a carrier.

How long
transit con-
tinues.

The general rule is, that the *transitus* continues, and that consequently the right of stoppage exists until the goods arrive at the actual or constructive possession of the vendee or consignee, as owner (*l*). In the earlier cases it was considered that nothing but an actual delivery to the consignee would defeat the exercise of the right; but this doctrine has been long abandoned (*m*); and now the question always is, have the goods

(*g*) See the judgment of Lord Abinger, C. B., in *Gibson v. Carruthers*, 8 M. & W. 321. The first case in which the principle appears to have been acted upon in our Courts is *Wiseman v. Vendueput*, 2 Vern. 203.

(*h*) See *Bloxam v. Sanders*, 4 B. & C. 941; *Clay v. Harrison*, 10 B. & C. 99; and the judgment of Parke, B., in *Wentworth v. Outhwaite*, 10 M. & W. 436. The better opinion is, that it does not rescind the contract. *Ib.*, and see the notes to *Lickbarrow v. Mason*, 1 Smith's L. C. (8th edit.) 810; *Schotsman v. The Lancashire and Yorkshire Rail. Company*, L. R., 2 Ch. 332; Benjamin on the Contract of Sale, 723—725 (edit. 1873). This right arises properly only in cases in which the consignee has become bankrupt or insolvent; but a right of a similar nature may exist in other cases by contract. See *Wilmhurst v. Bowker*, 2 M. & Gr. 792; *S. C.*, 7 M. & Gr. 882; and the judgment in *The Constantia*, 6 Rob. 321. The question is discussed in Smith's Merc. Law (6th ed.) 554, note (*b*); and the learned

author thinks that a general inability to pay, evidenced by stoppage of payment, is sufficient to satisfy the rule, although there has been no actual insolvency. See further as to this right, Paley's P. & A. c. 4, s. 5.

(*i*) *Schotsman v. The Lancashire and Yorkshire Railway Company*, L. R., 2 Ch. 332. The vendor can only claim his goods back again; he cannot recover the insurance upon them should they have been damaged in the transit. *Berndtson v. Strang*, L. R., 3 Ch. 588.

(*k*) See the judgment in *Gibson v. Carruthers*, 8 M. & W. 321.

(*l*) See the judgment of Tindal, C. J., in *Jackson v. Nichol*, 5 N. C. 516; *Heinekey v. Earle*, 8 E. & B. 410; and the cases there cited.

(*m*) *Hunter v. Beale*, cited 3 T. R. 466, where Lord Mansfield used the expression "the goods must have come to the corporal touch of the vendee." But see *Ellis v. Hunt*, 3 T. R. 464; *Dixon v. Baldwin*, 5 East, 176; *Litt v. Cowley*, 7 Taunt. 169.

arrived at the actual destination originally contemplated by the vendee, or have they, in the meantime, come to his actual or constructive possession? Where the destination of the goods is left in doubt under a charter-party, but a port of call is named therein where the vessel must touch, for orders where to proceed to, the arrival of the vessel there does not end the *transitus*, and a stoppage of the goods thereat would under ordinary circumstances be valid (n).

The carrier being usually a mere agent for the *passage* of the goods, his possession is not in general the constructive possession of the vendee; at least, so far as to interfere with the right of stoppage; even although the vendee may have specially appointed him (o). And in ordinary cases the transit continues as long as the goods are in the carrier's possession, not only in the actual course of the journey or voyage, but even while they are in a place of deposit connected with their transmission, such as a warehouse (p). If, however, the vendee take them out of the possession of the carrier before their arrival, whether with or without his consent, there seems to be no doubt that the transit is at an end; although the carrier, in the absence of his consent, might have a right of action against the vendee for so doing. So, there may be a constructive possession by the vendee although the goods are still in the carrier's hands, as where the latter enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination

General effect of delivery to a carrier.

(n) *Fraser v. Witt*, L. R., 7 Eq. 64.

(o) *Berndston v. Strang*, L. R., 4 Eq. 481; *Ib.*, 3 Ch. 588, 590; *Ex parte Watson*, *In re Love*, 5 Ch. D. 35; *Ex parte Cooper*, *In re MacLaren*, 11 Ch. D. 68; *Ex parte Rosevear China Clay Company*, *In re Cock*, 4 ib. 560, where James, L.J., said, "The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser, or of some one who can be treated as

his servant or agent, and not in the hands of a mere intermediary. See also *Rodger v. Le Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393.

(p) *Mills v. Ball*, 2 B. & P. 457; *Holst v. Pownal*, 1 Esp. 240; *Hodgson v. Loy*, 7 T. R. 440. See *Ex parte Barrow*, *In re Worsdell*, 6 Ch. D. 783; where goods were shipped on board a steamer for delivery to the purchaser at Falmouth, the goods were discharged at Falmouth, and taken to the warehouse of an agent of the steamship company, and it was held that the *transitus* had not ended on the transfer of the goods to the warehouse of C., who held them as a forwarding agent only.

pursuant to that contract, but in a new character, for the purpose of custody on his own account, and subject to some new order to be given to him (*q*). So, when the goods have arrived at the termination of the *transitus* prescribed by the vendor, and the purchaser has by indorsing bills of lading representing the goods to his agent enabled him to obtain possession of them, the right of stoppage *in transitu* is at an end, notwithstanding that the goods remain to be forwarded by another stage of transit to the purchaser, and that his agent, who has the possession of the goods, is the person by whom the goods are to be so forwarded (*r*).

Effect on
right of inter-
ference with
the carrier by
the vendee.

There are also other acts by which an actual or constructive possession may be taken by the vendee, although the goods have not been delivered at their ultimate destination. Thus, where the vendee, having notice that the goods had arrived at the carrier's warehouse, removed part of them, and left the residue after taking samples, requesting the carrier to allow them to remain in the warehouse for his convenience until he should send further directions, it was held that the transit was determined, as the vendee had by his own act prevented the delivery (*s*). Where goods were sent by the direction of the vendee to a place at which he did not reside, and when they reached it they were left in a warehouse belonging to third parties, who

(*q*) See the judgment in *Whithead v. Anderson*, 9 M. & W. 534; *Tucker v. Humphrey*, 4 Bing. 516. A mere promise by the mate to the consignee that the goods shall be delivered to him as soon as they can be got at, does not determine the *transitus*. *Coventry v. Gladstone*, L. R., 6 Eq. 44. A delivery to a carrier selected by the vendor may be sufficient evidence of a delivery to support a count for goods sold and delivered; but it is not enough to satisfy the 17th section of the Statute of Frauds. *Meredith v. Meigh*, 2 E. & B. 364; *Coombs v. The Bristol and Exeter Railway Company*, 3 H. & N. 510. See also as to what is evidence of the acceptance of goods in a warehouse by a purchaser, *Castle v. Swoorder*, 5 H. & N. 281; *S. C.*, in Cam. Scacc., 6 *ib.* 828.

(*r*) In *re Whitworth, Ex parte Gibbs*, 1 Ch. D. 101. In that case, cotton was consigned to the vendor's agent

at Liverpool, to whom the bills of lading were also sent by the vendor, the bills of lading provided for the delivery of the cotton at the port of Liverpool to order or assigns. On the arrival of the cotton at Liverpool, the purchaser sent to the vendor's agent his acceptance for the price of the cotton, and the bills of lading were then sent to the purchaser, who indorsed them, and sent them to the manager of a railway company, who obtained possession of the cotton, and forwarded it by his railway to the purchaser, who lived in Yorkshire; it was held, that the *transitus* prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it *in transitu*.

(*s*) *Foster v. Frampton*, 6 B. & C. 107.

were wholly unconnected with the carrier, and who had been previously in the habit of receiving goods for the vendee and of holding them at his risk until he fetched them away or gave further orders, without charging him any warehouse rent, it was held that the carrier's duty was complete, and that the goods having been delivered to an agent of the vendee the transit was at an end (*t*). It appears also to be clear, that if the goods are delivered at the warehouse of any wharfinger, packer, or other middleman, which the vendee uses as his own, or even if they are left at the warehouse of the vendor, which the vendee uses as his own by paying a warehouse rent, the transit may be, and ordinarily will be, determined (*u*). The mere fact, however, that rent has been charged by the vendor will not affect the question if the goods remain in his warehouse and under his control (*x*).

So, the exercise by the vendee of acts of dominion and ownership over the goods, such as taking samples under circumstances which show that it is done with the intention of taking possession of the whole, will determine the transit (*y*). Thus, where goods bought for exportation were sent to the vendee's shipping agents to be forwarded abroad, and after they had been shipped by them were relanded and sent back to the vendors to be repacked, and the vendee became bankrupt whilst the goods were in their possession for this purpose, it was held, that the vendors had acquired no new right by this re-delivery, and that the transit had been determined by the delivery to the shipping agents, or, at all events, by the exercise of acts of ownership by the vendee (*z*). Indeed, it may be stated as a general rule, that whenever it appears that the carrier, or other agent in whose possession the goods are, is not merely an agent for the *passage*

Of acts of ownership done by vendee.

(*t*) *Dodson v. Wentworth*, 4 M. & Gr. 1081; see also *Wentworth v. Outhwaite*, 10 M. & W. 436; *Dixon v. Baldwin*, 6 East, 175.

(*u*) See the judgment in *Scott v. Pettit*, 3 B. & P. 469; and *Leeds v. Wright*, *ib.* 320; *Richardson v. Goss*, *ib.* 119; *Hurry v. Mangles*, 1 Camp. 452; *Rowe v. Pickford*, 8 Taunt. 83; *Allen v. Gripper*, 2 Cr. & J. 218.

(*x*) *Miles v. Gorton*, 2 Cr. & M. 504.

(*y*) *Foster v. Frampton*, 6 B. & C. 107; *Dixon v. Yates*, 5 B. & Ad. 313; *Jones v. Jones*, 8 M. & W. 431. It

would seem that where the goods are left in the carrier's possession, acts of marking or of taking samples done by the vendee with the intention of taking a constructive possession, must, in order to be effectual, be accompanied with such circumstances as denote that the carrier was intended to keep, and assented to keep, the goods as an agent for custody. See the judgment in *Whitehead v. Anderson*, 9 M. & W. 536.

(*z*) *Valpy v. Gibson*, 4 C. B. 837.

of the goods, and does not hold them for the purposes of the transmission, and it is not intended necessarily that they should ever come otherwise into the possession of the vendee than by being in that of this agent, the transit is determined (*a*).

And, on the other hand, the right to stop may still exist although the vendee has taken possession of the goods, if it appear that he did so, not *as owner*, but in order to hold them for the vendor (*b*).

Of delivery
on board
vendee's own
ship.

A delivery to the vendee on board his own ship ordinarily puts an end to the right to stop (*c*). And this may be so, although the ship be not expressly sent for them, but is used at the time as a general ship (*d*). Where the ship was chartered to the vendee for three years, and employed by him to convey the goods, not to himself, but abroad, on a speculation of his own, a delivery on board was held to be a delivery to himself (*e*). But the mere fact of the ship having been chartered by the vendee does not make her his own ship, so as to make a delivery on board that ship necessarily a delivery to him (*f*). The goods must be delivered *to be carried on behalf of the vendee*, for if it appears from the fact of the bill of lading making them deliverable to the order of the vendor, or otherwise, that it is the intention of the vendor to preserve his title to them until some further act is done, this would, it seems, be a delivery to the master to carry *for the vendor*, even although the ship might be that of the vendee, and the right to stop would still exist. Even, however, where the bill of lading is so framed, it is a question for the jury, looking at all the facts of the case,

(*a*) Paley's P. & A. c. 4, s. 5; and see the judgment in *Van Casteel v. Booker*, 2 Ex. 691.

(*b*) *James v. Griffin*, 2 M. & W. 623. In *Litt v. Cowley*, 7 Taunt. 169, it was held that a delivery of the goods by the carrier to the vendee by mistake, after a notice from the vendor to stop them, did not deprive the vendor of his right of stoppage. But it may be doubted whether this decision is consistent with the general principles applicable to cases of stoppage in transitu, and whether the true view was not that, as between the vendor and the vendee, the transit was determined although the vendor might have a remedy against the carrier. See *Coxe v. Harden*, 4 East, 211; and *Heinekey v. Earle*, 8 E. & B. 410, and the cases

there cited. *Bolton v. Lancashire and Yorkshire Railway Company*, L. R., 1 C. P. 431.

(*c*) *Ogle v. Atkinson*, 5 Taunt. 759; *Van Casteel v. Booker*, 2 Ex. 699; *Turner v. The Liverpool Docks Co.*, 6 Ex. 543. But see *Mercantile Bank v. Gladstone*, L. R., 3 Ex. 233, and see *supra*, p. 347, n. (*p*).

(*d*) *Schotsmann v. Lancashire and Yorkshire Railway Company*, L. R., 2 Ch. 332, reversing the decision of the M. R., L. R., 1 Eq. 349.

(*e*) *Fowler v. M'Taggart*, cited 1 East, 522; S. C., 3 East, 388.

(*f*) *Bohtlingk v. Inglis*, 3 East, 381. In the earlier cases it was held otherwise. See *Inglis v. Usherwood*, 1 East, 513.

whether the delivery was really on behalf of the vendor or on that of the vendee (*g*). In a modern case, *A.*, a planter residing in Jamaica, being indebted to *B.*, a merchant residing in London, in a larger amount than the value of certain sugars, shipped them on board a ship belonging to *B.*, which was used to carry supplies to Jamaica to the estates of *A.* and to bring back consignments from him and others, and was then employed for this purpose. The master signed and delivered to *A.* a bill of lading by which the goods were to be delivered to *B.* in London, he paying freight; but afterwards *A.* made an indorsement on the bill that the goods were only to be delivered to *B.* if he gave security for certain payments; and that otherwise they were to be delivered to *A.*'s agent. *A.* then indorsed and delivered the bill to a third person, to whom he was indebted in more than the value of the goods. It was held, that *A.* had a right to change the destination of the goods before the delivery of them, or of the bill of lading to *B.*, and that the property in them had not passed to *B.* (*h*). And where goods were sold and shipped at Hull on board a vessel chartered by the buyer, "to be paid for in cash against bill of lading in the hands of the seller; agent in London," it was held that no property passed to the buyer until this condition was fulfilled, and that the price being unpaid, the seller was entitled to stop the delivery (*i*).

Where goods sold in London "free on board," to be paid for on delivery on board by bill or cash at a certain discount, were shipped on a vessel selected by the vendee, and the vendor elected to take a bill, and it appeared that by the custom of the port the expression "free on board" indicated that the vendee was considered as the shipper, although the vendor was to pay the expenses of shipment, it was held that the transit was determined by the delivery on board and receipt of the bill (*k*).

(*g*) *Wait v. Baker*, 2 Ex. 1; *Van Casteel v. Booker*, *ib.* 691; *Turner v. Trustees of Liverpool Dock Company*, 6 Ex. 543; *Ellershaw v. Magniac*, *ib.* 570; *Jenkyns v. Brown*, 14 Q. B. 496; *Browne v. Hare*, 3 H. & N. 484, and *Brown v. North*, 8 Ex. 1. See also *Craven v. Ryder*, 6 Taunt. 423; *Ruck v. Hatfield*, 5 B. & A. 632; *Joyce v. Swann*, 17 C. B., N. S. 84; *Berndtson v. Strang*, L. R., 4 Eq. 481; 3 Ch. 588; *Gumm v. Tyrie*, 4 B. & S. 680; *S. C.* in Cam. Scac., 6 B. & S. 298; *Fraser v. Witt*, L. R., 7 Eq. 64.

(*h*) *Mitchell v. Ede*, 11 A. & E. 888. This was not a case of stoppage in transitu. See also as to the effect of the delivery of goods to a carrier. *Meredith v. Meigh*, 2 E. & B. 364; *Coombs v. The Bristol and Exeter Railway Company*, 3 H. & N. 510; *Heinskey v. Earle*, 8 E. & B. 410.

(*i*) *Moakes v. Nicolson*, 19 C. B., N. S. 290.

(*k*) *Cowasjee v. Thompson*, 5 Moo. P. C. C. 165. See also *Browne v. Hare*, 3 H. & N. 484; *S. C.* in Cam. Scac., 4 *ib.* 822; and *Green v. Sichel*, 7 C. B., N. S. 747.

Of sale of
goods in a
warehouse.

There are also cases in which, although there is no transit, in the ordinary sense of the word, between the vendor and the vendee, yet questions of stoppage may arise. As where goods are sold whilst in the possession of a warehouseman, wharfinger, or other agent, who holds them for the vendor, and the transfer of the possession is merely symbolical.

The general rule is, that if a delivery order is given by the vendor to the vendee, and the agent who holds the goods assents to it by transferring them in his books, or otherwise, (or even, it would seem, if he does not assent,) and no acts remain to be done by the vendee which are essential to the completion of the contract,—such, for instance, as weighing, measuring, or separating the goods, so as to ascertain their quantity, value, or identity,—the right of stoppage is gone (*l*). The mere giving of a delivery order does not operate as a constructive delivery of the goods (*m*); and it is clear that the transfer of a delivery order has not the peculiar operation of the indorsement of a bill of lading, so as to pass the property in goods which are at sea, and not in the possession of the agent on whom the order is made (*n*).

It must also be recollected, that the question as between the vendee and the warehouseman or agent, in these cases, is not always the same as that between the vendee and the vendor; for if the agent acknowledges to the vendee that he holds the goods for him, he cannot afterwards set up the right of the vendor to stop them (*o*). Where, however, goods were sold at Liverpool, and at the time of the sale they were in the warehouse of the vendors, who gave to the vendee a delivery order acknowledging that they held the goods to his order, and evidence was given that by the usage of Liverpool the invariable mode of delivering goods sold while in warehouse was that the

(*l*) *Withers v. Lys*, Holt, 18; *Zuinger v. Samuda*, *ib.* 395; *S. C.*, 7 Taunt. 265; *Lucas v. Dorrien*, *ib.* 278; *Hammond v. Anderson*, 1 N. R. 69; *Hanson v. Meyer*, 6 East, 614; *Harman v. Anderson*, 2 Camp. 343; *Swanwick v. Sothorn*, 9 A. & E. 895; *Wood v. Tussell*, 6 Q. B. 234; *Tanner v. Scovell*, 14 M. & W. 28; *Lackington v. Atherton*, 7 M. & Gr. 360. If a delivery order is lodged with a warehouse-keeper, and he accepts it, he becomes the agent of the vendee who lodges it, and cannot contest his title or claim a lien on the goods. See the judgment of Lord Campbell, *O. J.*, in *Pearson v. Dawson*, 1 E. R. 456. See also as to what are sufficient acts of appropria-

tion to vest the property of goods in a vendee, *Langton v. Higgins*, 4 H. & N. 402; and *Castle v. Swoorder*, 5 H. & N. 281; *S. C.* in *Cam. Scacc.*, 6 *ib.* 828.

(*m*) *M'Ewan v. Smith*, 2 H. L. C. 309.

(*n*) *Akerman v. Humphrey*, 1 C. & P. 53; recognized in *Tucker v. Humphrey*, 4 Bing. 516; and *Jenkyns v. Osborne*, 7 M. & Gr. 678. And see as to the force of delivery orders, *Gunn v. Bolkow Vaughan and Company*, L. R., 10 Ch. 732; *The Imperial Bank v. The London and St. Catherine's Dock Company*, 5 Ch. D. 195.

(*o*) *Stonard v. Dunkin*, 2 Camp. 344; *Haues v. Watson*, 2 B. & C. 540.

vendors should hand delivery orders to the vendees, the Court held that, as between the vendor and the vendee, the right of lien was not divested by the giving of the delivery order (*p*).

We have already seen that the *bond fide* negotiation of the bill of lading, that is to say, the transfer of it by a *bond fide* indorsement made by or under the authority of the shipper or consignee to a third person on good consideration (*q*) and without notice of the insolvency of the vendee, will defeat the right to stop (*r*). It is not material that the indorsee knows that the consignor has not been paid for the goods in money, if he does not know that the consignee is insolvent, or that the bills given are not likely to be paid (*s*). No property, however, passes by the indorsement if there is fraud in the transfer, or if there is notice by the previous indorsement that the earlier transfer is conditional only (*t*); or if the indorsee knows of the insolvency of the consignee (*u*). Nor can the *bond fide* indorsee for value interfere, by virtue of the indorsement to him, with the stoppage *in transitu*, if the person by whom the bill of lading was first indorsed had no authority from the shipper or consignee to put it into circulation (*x*). It is expressly provided by the

Of indorsement of bill of lading.

(*p*) *Townley v. Crump*, 4 A. & E. 58.

(*q*) In *Leask v. Scott*, 2 Q. B. D. 376, it was held, that the transfer of a bill of lading for valuable consideration to a *bond fide* transferee is sufficient to defeat the right of stoppage *in transitu*, although the consideration was an advance of money made before the bill of lading was transferred. In this case, the Court of Appeal dissented from the decision of the Judicial Committee of the Privy Council in the case of *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393, where it was held, that a pre-existing debt was not a valuable consideration for the indorsement of a bill of lading so as to defeat the right of stoppage *in transitu*.

(*r*) *Ante*, p. 344; *Lickbarrow v. Mason*, 4 Bro. P. C. C. 57; 8 C. 5 T. R. 683; *Walley v. Montgomery*, 3 East, 585; *Wilmsheurst v. Bowker*, 7 M. & Gr. 882; and the notes to *Lickbarrow v. Mason*, 1 Smith, L. C. (8th edit.) 810. It is to be observed that this peculiar effect of the assignment of a bill of lading does not depend upon the fact that the right of property in the goods passes by the in-

dorsement, but upon the operation of the indorsement to transfer a sort of constructive possession of them. For in the ordinary case of the sale of an ascertained chattel, the property passes by the law of England, by virtue of the bargain only (see *Shep. Touchst.* 224, and the judgment of Parke, J., in *Dixon v. Yates*, 5 B. & Ad. 313), yet the right of stoppage exists if there has been no actual or constructive delivery to the vendee. In some of the cases as to stoppage *in transitu*, confusion has arisen from the use of expressions implying that the passing of the property is the test as to whether the right to stop is lost.

(*s*) *Cuming v. Brown*, 9 East, 506; *Jones v. Jones*, 8 M. & W. 431.

(*t*) See the cases cited in the last note, and *Barrow v. Coles*, 3 Camp. 92.

(*u*) *Fertue v. Jewell*, 4 Camp. 31.

(*x*) See the judgment in *Gurney v. Behrend*, 3 E. & B. 622, and the remarks thereon in *Coventry v. Gladstone*, L. R., 4 Eq. 493, and *The Argentina*, L. R., 1 A. & E. 370. But it is only in case of the original transfer of a bill of lading deliverable to the assigns of the shipper the fraud

18 & 19 Vict. c. 111, which transfers to the indorsees of bills of lading the rights and liabilities contained in the contract, that the provisions in the statute are not to affect in any way the right of stoppage *in transitu* (y).

Of counter-
mand of de-
livery.

After an indorsement and delivery of the bill of lading and invoice of the goods as a security against bills which are to be drawn by the indorsers of the bill of lading on the indorsees, the indorsers cannot, after they have obtained the acceptances, and whilst the balance of accounts is in the favour of the indorsees, countermand the delivery of the goods; and the master is liable in trover if he acts on such an order (z). Where the consignor was at the time of the indorsement of the bill of lading indebted to the consignee on the balance of accounts, including certain bills of exchange accepted by the consignee, it was held, that the consignor had no right to stop the goods upon the insolvency of the consignee before the bills were paid; the Court thinking that, under the circumstances, the consignee was to be considered as a purchaser for a valuable consideration (a).

It must be observed, that where the bill of lading is negotiated by way of pledge, the vendor may, by giving notice to the person with whom it is pledged, resume the possession of the goods subject to the specific advance made by the latter upon them (b).

Notice by letters of the consignment of goods to a person who has accepted bills on the faith of it cannot be treated as equivalent to the indorsement of the bills of lading (c); nor does the transfer of a delivery order operate in the same way as such an indorsement (d).

has this effect. In such case, there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. In other cases, the right of a *bond fide* indorsee without notice of a fraud committed by the indorser prevails over the claim of the unpaid vendor to stop. *The Marie Joseph*, Br. & L. 462; L. R., 1 P. C. 219.

(y) See s. 2 (Appendix, p. clxxvi).

(z) *Haille v. Smith*, 1 B. & P. 563.

(a) *Vertue v. Jewell*, 4 Camp. 31.

(b) *In re Westvintus*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376,

affirmed 15 L. J., Ch. 374; *Berndtson v. Strang*, L. R., 4 Eq. 481; 3 Ch. 588.

(c) *Nichols v. Clent*, 3 Price, 547. In a case at Nisi Prius, where the bill of lading had been sent to a person without a regular indorsement, and a letter had been written to him expressing an intention to indorse it, it was held that this was, as against an actual indorsee with notice of the facts, equivalent to an actual indorsement. *Dick v. Lumden*, Peake, N. P. C. 189.

(d) *Ante*, p. 421.

Where there would be a right to stop if the *transitus* had begun, there is, *à fortiori*, a right to refuse to deliver so as to make the *transitus* commence (e); and we have seen that where there is no insolvency, a consignor who has hired the entire use of a ship may, under ordinary circumstances, take out the cargo before the vessel sails where the freight is made payable independently of the carriage of the cargo at a day not then arrived, and the charter-party does not provide that the goods shall not be removed (f).

Of right to refuse to allow transit to begin.

The right of stoppage is not taken away by part payment (g); or by the acceptance of a bill for the price of the goods; or by a part delivery of them; unless the vendee takes possession of the part, meaning thereby to take possession of the whole (h); in which case, the stoppage will only affect the goods which have not been delivered; that is to say, it will not revert in the vendor any right over the goods actually delivered, although he will, it would seem, be entitled to hold the goods which are stopped until the price of the whole has been paid (i).

Of part payment and part delivery.

A resale of the goods by the vendee, and payment to him, does not, if there has been nothing equivalent to a delivery of the goods to the vendee, destroy the right to stop (k).

Of a resale.

A lien against the consignee cannot be set up to defeat the stoppage of the goods by the consignor, for the right of lien is not available against third persons (l).

Of a lien against consignee.

Lastly, this right must be exercised by or on behalf of the vendor; a person who is neither vendor nor consignor, but only

Who may exercise right.

(e) See *Dixon v. Yates*, 5 B. & Ad. 313, and *Gibson v. Carruthers*, 8 M. & W. 321; *M'Ewan v. Smith*, 2 H. L. C. 309. A person who has shipped goods however on board of a general ship is not entitled at pleasure to demand them back without payment of freight. *Tindall v. Taylor*, 4 E. & B. 219; see *ante*, p. 319.

(f) *Ante*, p. 390; *Thompson v. Small*, 1 C. B. 328.

(g) *Hodgson v. Loy*, 7 T. R. 440; *Edwards v. Brewer*, 2 M. & W. 375. The consignor is not bound in these cases to tender back the bill. *Ib.*

(h) *Stubey v. Heyward*, 2 H. Bl.

504; *Turner v. Scovell*, 14 M. & W. 28. See also *Merchant Banking Company of London v. Phœnix Bessemer Steel Company*, 5 Ch. D. 205, the case of an apportionable contract.

(i) See the judgment in *Wentworth v. Outhwaite*, 10 M. & W. 436.

(k) *Craven v. Ryder*, 6 Taunt. 433; *Dixon v. Yates*, 5 B. & Ad. 313; see also on this point *Davis v. Reynolds*, 4 Camp. 267.

(l) *Oppenheim v. Russell*, 3 B. & P. 42; *Morley v. Hay*, 3 M. & R. 396; *Nicholls v. Le Feuvre*, 2 B. N. C. 81; *Leuckhart v. Cooper*, 3 B. N. C. 99; *Jackson v. Nichol*, 5 B. N. C. 508.

a surety for the price of the goods, cannot stop them (*m*). The consignor may stop, although the goods were consigned on the joint account of himself and the consignee, and a bill of lading has been sent to the latter making the goods deliverable to him or his assigns (*n*). Where the foreign correspondent of an English merchant procured goods abroad, on his own credit, from persons who were strangers to the English merchant, and shipped them on the account and risk of the latter at the original price, charging him only with a commission, it was held that the foreign correspondent was so far a vendor, as between him and the merchant here, that he might exercise the right of stoppage *in transitu* (*o*). A person, however, who has a mere lien on the goods, which he loses by parting with the possession of them, cannot exercise this right (*p*).

Where the stoppage is effected by a person who has at the time no authority, a ratification of his acts by the consignor, made after the transitus is ended, is not sufficient; for the ratification must be made at a time when, and under circumstances in which, the ratifying party might himself have lawfully done the act which he ratifies (*q*).

There may of course be a rescission of the contract of sale by the mutual consent of the vendor and vendee, after the right of stoppage has ceased to exist (*r*).

How it
should be
exercised.

The proper and ordinary mode of stopping the goods is to give notice to the carrier or person in whose custody they are, and to demand them of him. This notice ought either to be given to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time and under such circumstances, that he may by reasonable diligence communicate it to his servant in time to prevent the delivery (*s*).

The rights of factors to deal with bills of lading and other *indicia* of property in goods, are now regulated by the statutes

(*m*) *Stiffen v. Wray*, 6 East, 371.

(*n*) *Newson v. Thornton*, 6 East, 17.

(*o*) *Feise v. Wray*, 3 East, 93.

(*p*) *Sweet v. Pym*, 1 East, 4.

(*q*) *Bird v. Brown*, 4 Ex. 786.

(*r*) See *Heinekey v. Earle*, 8 E. & B. 410, where the Court held that in fact an offer to rescind had not been acted on.

(*s*) *Whitehead v. Anderson*, 9 M. & W. 518. It seems the notice of stoppage *in transitu* given to a shipowner imposes no duty on him to communicate the notice to the master, and that it is not effective until it is communicated; *Ex parte Falke*, 14 Ch. D. 446.

commonly called the Factors Acts, 6 Geo. 4, c. 94, 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 39 (*t*).

The Interpleader Act (1 & 2 Will. 4, c. 58), which gives relief to persons who are sued for money or goods in which they have no interest, and which are also claimed by some third party, will be found sometimes to relieve masters of ships from difficulty in cases of conflicting claims to goods in their possession (*u*).

Where, as is usually the case, the property embarked in the voyage and adventure belongs to different owners, it sometimes becomes necessary to sacrifice the rights of some of them for the general good of all; and in this event the law provides that an equitable adjustment and distribution of the loss shall be made between all the parties interested (*x*).

(*t*) For the decisions under these acts, see the notes to *Lickbarrow v. Mason*, 2 Smith's L. C. 831 (8th ed.); and see *supra*, p. 347.

(*u*) It was held, in some cases, that this act did not apply where the person holding the goods had incurred a personal liability to either of the contending parties. *Patorni v. Campbell*, 12 M. & W. 277; *Lindsey v. Barron*, 6 C. B. 291; *Horton v. Earl of Devon*, 4 Exch. 497; *Crawshaw v. Thornton*, 2 Myl. & Cr. 1. The act was also thought not to apply where the title of the claimants had not a common origin. The Common Law Procedure Act, 1860, now, by s. 12, enables "a judge to make an interpleader order, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another." The effect of this section and of recent decisions, has been to remove both of the above exceptions. See the note upon this section in Day's Common Law Procedure Acts; *Maynell v. Angell*, 32 L. J., Q. B. 14; *Best v. Hayes*, 1 H. & C. 718; *Tanner v. The European Bank*, L. R., 1 Ex. 261; *Attenborough v. St. Catherine Dock Company*, 3 C. P. D. 450. As to the practice in interpleader, see Ord. l. r. 2, 1875, and Wilson's Judicature Acts, 129, where the whole system of interpleader is fully reviewed. Where two different claimants demand the same goods, it

seems the master may interplead. See *The Tigress*, Br. & L. 45, and see *supra*, p. 359. But where proceedings are already pending in the Admiralty Division, and that Court can decide the whole question, the Chancery Division will refuse to interfere. *Sablicich v. Russel*, L. R., 2 Eq. 441.

(*x*) There are, perhaps, no subjects upon which the laws of different countries have differed more than questions as to general average, and the mode of contribution towards it. These subjects have been largely and ably dealt with both by English and by foreign jurists. The observations in the text are, however, almost entirely confined to the decisions of our Courts upon these points; for although it is frequently interesting and useful to know what may be the rule of foreign systems in any given case, these enquiries do not fall within the scope of this work, and when any point arises in our Courts which has not been decided in them actually, or by analogy, it is very uncertain how far the principles of foreign lawyers will be adopted. See an elaborate summary of the principles governing cases of general average in the judgment in *Barnard v. Adams*, 10 How. (American) Rep. 270. General average is neither within the words or the object of the suing and labouring clause in a policy. *Lohre v. Aitchison*, 4 App. Ca. 755; *Dixon v. The Sea Insurance Company*, Court of Appeal, March 6, 1880.

Cases of *general or gross average* (*y*) arise, therefore, where loss or damage is *voluntarily and properly incurred* in respect of the goods, or of the ship, for the general safety of the ship and cargo (*z*).

Loss must be voluntarily incurred.

The loss or injury must be *voluntarily incurred*; that is to say, there must be a *sacrifice* (*a*) of part for the sake of the rest (*b*).

Jettisons.

Thus, to put the simplest, and in early times the most usual form of this question, if goods are thrown overboard in a storm for the purpose of saving the ship and residue of the cargo from

(*y*) *Simple or particular average* arises where any damage is done to the cargo or vessel by accident or otherwise, such as the loss of an anchor or cable, the starting of a plank, the turning sour of a cargo of wine, which are all losses which rest where they fall. See the judgment of Sir W. Scott in *The Copenhagen*, 1 Rob. 289. This expression, as applied to losses of this description, has been said to be inaccurate; but the term *average* appears strictly not to imply any more than a *damage*. See Ducange Gloss. *Averia*; Encyclopédie du Droit, tit. *Avarie*; Benecke's Princ. of Indemn. 167; Stevens on Average; Bailly's "Perils of the Sea." As to the meaning of this term in policies of insurance, see *post*, Chap. VII., INSURANCE, Part I.; *The Great Indian Peninsular Railway Company v. Saunders*, 1 B. & S. 41; S. C. in Cam. Scacc., 2 ib. 266; *Kidston v. The Empire Marine Insurance Company*, L. R., 1 C. P. 535. See also *Schuster v. Fletcher*, 3 Q. B. D. 418.

(*a*) "Lege Rhodiâ cavetur ut, si levandæ navis gratiâ jactus mercium factus sit, omnium contributione sarciantur, quod pro omnibus datum est." Dig. lib. xiv. tit. 2, fol. 1. It is well known that this rule is of high antiquity, and that it was adopted into the Digest from the so-called Rhodian law. See Pardessus' Dissertation on the Origin of this Compilation, 1 Lois Marit. chap. 6, p. 209; Pothier Traité des Contrats des Louages Maritimes, Seconde Partie; Park on Ins. 202; 3 Kent Com. 232. In the English Reports questions of average do not occur early. *Hicks v. Palington*, Moo. Rep. 297 (32 Eliz.), appears to be one of the earliest reported cases as to average. In *Moussé's Case*, 12 Rep. 63;

1 Roll. Rep. 79, where it was held that passengers may for the safety of their lives and *navis levandæ causâ*, throw goods overboard without being therefor responsible to the owners, no question of average, properly speaking, seems to have been raised. There is no doubt, however, that the principle of this rule was adopted from a very early period into our maritime law, either from the laws of Oleron or some other continental source; for, in 1285, Edward I. sent to the Cinque Ports letters patent declaring what goods were liable to contribute. See *post*, p. 435, note (*l*).

(*a*) If a mast be cut away under circumstances which show that it is already hopelessly lost, and so practically valueless, there being no sacrifice there is no average. *Shepherd v. Kottgen*, 2 C. P. D. 585. See the judgment of Brett, L. J., in that case, and *Corry v. Coulthard*, ib. 583, and the judgment of Cockburn, C. J., in *Schuster v. Kellar*, 2 Q. B. D. 425.

(*b*) See the judgment of Lord Ellenborough in *Power v. Whitmore*, 4 M. & S. 149; see also *Sheppard v. Wright*, 1 Show. P. C. 18; *Birkley v. Presgrave*, 1 East, 220, and the judgment of Lord Stowell in *The Copenhagen*, 1 Rob. A. R. 293; *Walshew v. Maurojani*, L. R., 5 Ex. 116; *Steward v. The West Indian and Pacific Steamship Company*, L. R., 8 Q. B. 88. According to the Rhodian law contribution was not only to be made in cases of jettison, but (and herein the Roman law was different) every loss by fire, pillage, shipwreck, or other *vis major* which could not be traced to any one, was to be made good by a general contribution on all that was saved. See 1 Pardessus Lois Marit. 226.

imminent danger, the several persons interested in the ship, freight, and cargo, must contribute rateably to indemnify the person whose goods have been sacrificed against all but his proportion of the general loss (c). This is the general principle.

There is no contribution where damage to goods is the result of the negligence or misconduct of the shipowner, as where it arises from unseaworthiness existing at the commencement of the voyage (d). No contribution in respect of loss arising from negligence.

The loss must be *properly* incurred; that is to say, it must be incurred for sufficient cause and under circumstances which show that the course pursued was prudent and reasonable, and not a mere act of groundless timidity (e). It should be effected with as much choice and deliberation as is possible; but by the law of England the master is not bound to consult with his officers or crew previously to the sacrifice; although this course, where practicable, is often prudent. In all cases, however, a formal protest or statement of the jettison or damage ought to be made on the earliest occasion, in order to rebut any suspicion of fraud (f). Or from loss improperly incurred.

As a general rule there is no contribution where the damage is only the natural result of a sea peril, although the exposure to that peril may have been caused by extraordinary exertions to avoid capture or wreck. Thus, where a ship, which had been captured by a privateer, effected her escape by carrying an unusual press of sail, and in so doing was much strained and injured, and lost the head of her mainmast, it was held that this was not a case for average, but only a sea risk, since if the weather had been better, or the ship stronger, nothing might have happened (g). Or from sea perils.

(c) See the judgment in *Butler v. Wildman*, 3 B. & Ald. 398; Park on Ins. 160. The loss of the owner of the goods jettisoned is total as against the underwriter, and the latter is bound to indemnify the assured, in whose place he is then entitled to stand with respect to the general average contribution. *Dickenson v. Jardine*, L. R., 3 C. P. 639. In cases of jettison, the freight which the shipowner would have received for the goods thrown

overboard must be made good to him by a general contribution. Benecké, *Princ. of Indemn.* 176.

(d) *Schloss v. Heriot*, 14 C. B., N. S. 59.

(e) See 3 Kent Com. 233; *Emérigon Traité des Assur.*, chap. xii. s. 39, vol. 1, p. 588.

(f) *Birkeley v. Presgrave*, 1 East, 220.

(g) *Covington v. Roberts*, 2 B. & P., N. R. 378.

Where a ship, in order to avoid being driven on shore, and for the necessary preservation of the ship and cargo, stood out to sea under a press of sail in tempestuous weather, and, in consequence, suffered injury in her hull, sails and tackle, it was held that there was not a general average loss (*g*).

But it is otherwise where there is a voluntary sacrifice of some portion of the ship or cargo for the general good, although the immediate cause of the damage may be a peril of the sea. Thus, where a ship was caught in a violent squall as she was entering harbour, and the master, in order to preserve the vessel and cargo, cut the cable from the best bower anchor, and saved the ship by mooring her with it to the pier, and he afterwards employed men to give extraordinary assistance, and to go on board to keep the ship clear of water, in order that the cargo might not be spoiled, it was held that the value of the cable, and also, apparently, the other expenses, were an average loss. The rule laid down by Lord Kenyon, C. J., in this case was, that all ordinary losses and damages sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the shipowners; but that all those articles which are expended by the master and crew upon a particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid for proportionably as a general average (*h*).

If to avoid danger, or to repair damage occasioned by a storm, the ship is compelled to take refuge in a port to which she is not destined, and in order to enter is obliged to lighten the ship by removing part of the cargo into barges, and this portion is lost on its passage to the shore, this loss is a general average, for it is occasioned by the voluntary removal of the goods for the common benefit (*i*).

Upon the same principles it is said, in an early case (*j*), that there must be contribution if parcel of the goods is *given* as a

(*g*) *Power v. Whitmore*, 4 M. & S. 149.

(*h*) *Birkley v. Presgrave*, 1 East, 220; see also *Marsham v. Dutrey*, Select Cases of Evidence, 58; 2 Phillips on Insur. 88. See also *Harrison v. The Bank of Australasia*, L. R., 7 Ex. 39, where the Court was divided as to whether the burning of spars to work a donkey-engine during stress of weather created a claim for general

average. In *Robinson v. Price*, 2 Q. B. D. 91, 295, such a claim was upheld. The master in this case had burned some spare spars and cargo. The Court said that if there had not been a reasonable supply of coal for the donkey-engine the average claim could not have been supported.

(*i*) Park on Ins. 205.

(*j*) *Hicks v. Palington*, Moo. 297.

composition to a pirate to save the residue, but that it is otherwise if a pirate *takes* part by violence.

Damage done to the cargo of a ship in port by pumping in water to extinguish a fire, whereby the ship and residue of the cargo were preserved, gives the owner of the cargo so damaged a right to contribution (k).

There appears to be no doubt that damage voluntarily and necessarily done to the ship in order to facilitate the jettison, is a general average loss. Damage done to ship to facilitate jettison.

Any loss necessarily and directly resulting from a voluntary stranding of the vessel upon a rock or strand in order to avoid wreck or capture, must also, if the ship is recovered so as to perform the voyage, be made good by a general contribution (l). Voluntary stranding.

Where a ship was in the course of her voyage run foul of by another ship, owing to the violence of the wind and weather, and was damaged, and the master was in consequence obliged to *cut away part of the rigging*, and to return to port to repair the injuries sustained by the accident and by the cutting away, and it appeared that the ship could not have prosecuted her voyage, or have kept the sea in safety without returning and repairing, the Court held that the expenses of repairs, so far as they were absolutely necessary to enable the ship with her cargo to prosecute the voyage (excluding from this calculation any benefit to the ship beyond the mere removal of her incapacity to proceed), might properly be considered as a general average; and that the expenses of unloading might also be included, if this was necessary in order to effect the repairs. It was considered, however, that the expenses of the master, during the Expenses of unloading, port charges, &c.

Q. B. (k) *Stewart v. West India and Pacific Steamship Company*, L. R., 8 Q. P. 88. This right has been held to exist against the shipowner, although the bill of lading under which the goods were shipped contained the exception of "fire on board." *Schmidt v. Royal Mail Steamship Company*, 45 L. J., Q. B. D. 646.

(l) *Benecké*, Princ. of Indemn. 215; *Arnould on Insur.* 915 (2nd edit.). It will be observed, from the cases cited above, that the claim to contribution may extend to collateral damage necessarily connected with the main in-

jury which forms the subject of general average. A question which has been much discussed by foreign jurists, and with different results, is, whether, if the ship is wholly lost by the act of running her on shore, and the cargo is saved, the goods are bound to contribute. There has been no decision in our Courts on the point. In America it has been held that the goods must contribute. See *The Columbian Insurance Company v. Ashby*, 13 Peters' (American) Rep. 331; 3 Kent Com. 239; *Arnould on Insur.* 918 (2nd edit.).

unloading, repairing, and reloading, and the cost of crimpage to replace deserters, during the repairs, must be borne by the shipowner (*m*). Where a ship was stranded by perils of the sea, and in order to get her off the cargo was discharged, and forwarded in another vessel, and subsequently expenses were incurred in getting the ship off and taking her into a port for repairs, it was held that the expenses incurred from the misadventure until the cargo was discharged constituted a general average, but that the subsequent expenses were not chargeable to general average, but to the ship alone (*n*). In this case it did not appear, however, that it was in any way for the advantage of the owner of the cargo that the ship should be got off and repaired, and the view taken of the facts by the Court was, that the goods had been in the first instance saved by a distinct and completed operation, and that afterwards a new operation began for the benefit of the shipowner. But in a later case, where the ship being stranded the goods were rescued and placed in a lighter, and remained under the control of the master until the ship was afterwards repaired and enabled to take in the goods again and prosecute her voyage, it was held that this was to be deemed one continuous transaction, and that the goods were liable to contribute to the expenses of the repairs to the ship, although they happened to be saved in the earliest part of the operation (*o*).

(*m*) *Plummer v. Wildman*, 3 M. & S. 482; and see as to the expenses of repairs and unloading in these cases, *Da Costa v. Newnham*, 2 T. R. 413; *Hall v. Janson*, 4 E. & B. 500; *Power v. Whitmore*, 4 M. & S. 141. Mr. Chancellor Kent (3 Com. 236), states that, according to the English law, where a ship is obliged by any sea peril to put into port for the general safety in order to refit, the wages and provisions of the crew are not, but that the expenses of unloading and warehousing, &c. are, a general average. There appears, however, to be no principle for this distinction; and it is to be observed that in *Plummer v. Wildman* the return to port was rendered necessary, not only by the damage sustained by the collision, but by the necessary and voluntary cutting away of part of the rigging. See *post*, p. 431, as to the rule, when such expenses are incurred owing to an injury which is itself the subject of general average. The

American Courts hold that where a ship is obliged to return to refit, the necessary expenses of unloading and reloading, and the wages and provisions of the crew, are a general average. See 3 Kent Com. 236, note (*c*); also *Job v. Langton*, 6 E. & B. 779; and *Moran v. Jones*, 7 E. & B. 523. The American authorities treat also expenses incurred in getting off a stranded vessel after the cargo has been removed to a place of safety as general average. In England this is otherwise. *Walthew v. Mavrojani*, 5 Ex. 116.

(*n*) *Job v. Langton*, 6 E. & B. 779; *Oppenheim v. Fry*, 5 B. & S. 348.

(*o*) *Moran v. Jones*, *ubi supra*. And see *Walthew v. Mavrojani*, L. R., 5 Ex. 116, where this and the preceding case are discussed and distinguished. See also Phillips on Ins. s. 1312; and Parsons on Shipping, vol. i. 390 (edit. 1869).

Where a ship puts into a port of distress owing to an injury which is in itself the subject of general average, the expenses of repairs and of unloading, for the purpose of the repairs and re-loading, and the seamen's wages, and cost of provisions during the detention, and the port charges and other charges on the vessel leaving port, form matter of general average (*p*). And it seems that where a ship is driven by sea-perils into a port to refit, owing to injuries which do not in themselves constitute a general average loss, that the expenses necessarily incurred in unloading and reloading the cargo, for the purpose of repairing the ship that she may be made capable of proceeding on the voyage, give a claim to general average contribution, for the acts which occasioned these expenses are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight (*q*).

*In new
Wagon
Wagon
(54)
53 LFDND*

In cases of detention by embargo, the wages and provisions of the crew are not a general average (*r*); nor are the expenses occasioned by ordinary quarantine, or by waiting for convoy. The expense of salvage appears, however, to be one that ought to be made good by general contribution (*s*).

*In cases of
embargo, &c.*

The law of general average is well illustrated by a recent case, in which a clipper with an auxiliary screw, whilst on her homeward voyage, was so damaged as to be obliged to put into Rio, having nearly exhausted her coals. The repairs necessary to restore her sailing powers would have cost much more than in England, and would have occupied several months, and the cargo would have to be unshipped and warehoused. The captain therefore had only temporary repairs done, sufficient to enable him to complete his voyage under steam alone, and in order to do this he had to purchase coals at Rio and again at Fayal.

(*p*) *Atwood v. Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286.

(*q*) See the judgment in *Hall v. Janson*, 4 E. & B. 500; *The Copenhagen Mening*, 1 Rob. 289; and *Stevens on Average*, 24 (2nd edit.). It has, however, for many years, as was proved in *Atwood v. Sellar*, been the practice of English average adjusters in such cases to treat the expense of warehousing the cargo as particular average on the cargo, and the expense of reshipment, pilotage and other expenses of leaving port as particular average on the freight, and Manisty, J., thought that this practice had be-

come law and bound the Court. Where a ship sinks in deep water with a cargo on board, the question as to whether the cost of raising her becomes chargeable as general average depends upon whether the expenditure will be for the common preservation of both. *Kemp v. Halliday*, L. R., 1 Q. B. 520.

(*r*) See the judgment of Buller, J., in *Da Costa v. Newnham*, 2 T. R. 413; *Arnould on Ins.* 929 (2nd edit.). In America the same rule is acted on. 3 Kent Com. 236.

(*s*) See *Arnould on Ins.* 931 (2nd edit.); *Kemp v. Halliday*, 6 B. & S. 723; *Schuster v. Fletcher*, Q. B. D. 418.

The shipowners sought to charge the cost of the coals against the shippers of cargo, either on the principle that the expenditure was a substitution beneficial to all parties for a greater expenditure which the captain had a right to incur by repairing at Rio, and ought to be apportioned in the same way as the greater expenditure would have been, or as an extraordinary expenditure for the general advantage of all interests concerned. It was held, assuming the repairing at Rio would have been justifiable, and any of the incidental expenses chargeable against the shippers as a general average, that there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted; that the shipowners, by the contract of affreightment on such a ship, were bound to give the services of the screw and to make all the necessary disbursements for fuel, and although the circumstances caused these to be heavy, they did not render them an extraordinary expenditure within the rule as to general average (*l*).

Sale of part
of cargo
rendered
necessary by
general
average loss.

Where part of the cargo is necessarily sold by the master in order to raise money for defraying expenses of repairing injuries which are themselves matter of general average, the loss must be made good by general contribution (*u*). It is otherwise where the loss or damage which renders the sale necessary is only a particular average. Thus, where the master was arrested at Copenhagen by the agent of the ship for a debt due to him personally, for money advanced to pay the Sound dues and the expenses of repairing sea damage suffered by the ship, and the master, in order to obtain his liberation and proceed on the voyage, sold part of the cargo, this was considered to be a loss which ought to fall on the shipowner only (*x*). And it is clear that no claim for general average can arise where the goods are sold merely to defray the expenses of repairs made necessary by ordinary sea perils against which the shipowner is bound by the contract of affreightment to provide (*y*).

(*l*) *Wilson and another v. Bank of Victoria*, L. R., 2 Q. B. 203.

(*u*) See *The Gratitude*, 3 Rob. 255, and *The Constanca*, 4 Notes of Cases, 677; Arnould on Ins. 907 (2nd edit.).

(*x*) *Dobson v. Wilson*, 3 Camp. 480.

(*y*) *Powell v. Gudgeon*, 5 M. & S.

431; *Hallett v. Wigram*, 9 C. B. 580; *Duncan v. Benson*, 1 Exch. 537; 3 Exch. 644; *Chapman v. Benson*, 6 M. & G. 792; *S. C.* in error, 2 H. of L. Cases, 696; 8 C. B. 950; see also *Wilson v. Bank of Victoria*, *ubi supra*.

The question whether any particular expenses of repairs done to a ship in a port of distress form a subject of general average, appears to depend upon the same principles. Where the injury itself is a general average loss, and in this case only, under ordinary circumstances, the repairs stand upon the same footing (z).

According to most of the foreign systems of law, goods laden on deck are excluded from the benefit of general average when they are lost by jettison; but by the law of this country (so far as it can be considered settled by actual decisions) there is no inflexible rule that in all cases, and under all circumstances, there shall be no contribution for the jettison of deck loads; on the contrary, if there is no statutory prohibition of this practice relating to the particular voyage (a), and there exist a custom in the trade to load the goods in this way, a claim for general average, in respect of their loss, may be sustained (b). Where the master has loaded the goods on deck with the consent of the merchant, a claim for contribution exists as against the shipowner; since there is no remedy in this case against the shipowner for a wrongful loading of the goods on deck, and if there were, as between these parties, no right to contribution, the owner of the goods would bear the whole of a loss which was incurred for the general benefit (c).

By the law of this country, the expenditure of ammunition in resisting capture, the damage done to the ship in the action, and the expenses of curing the wounded sailors, are losses which do not form the subject of general average. No particular part of the property is voluntarily sacrificed, in such a case, for the protection of the rest. The resistance is, it is true, for the general

Damage
incurred in
resisting
capture.

(z) Arnould on Ins. 922 (2nd edit.).

(a) See as to deck cargo, *ante*, p. 37.

(b) See *Da Costa v. Edmunds*, 4 Camp. 142; 2 Chit. Rep. 227; *Gould v. Oliver*, 4 B. N. C. 134; *Milward v. Hibbert*, 8 Q. B. 120; *Harley v. Milward*, 1 Jones & Carey (Irish), 224. In *Johnson v. Chapman*, 19 C. B., N. S. 563, the shipper of a deck cargo of timber which, having broken adrift and impeded the navigation and safety of the ship, was thrown overboard, was held entitled to average as against the ship-

owner. See also a learned note on this subject in the 10th edit. of Abbott on Shipping, 366, and 3 Kent Com. 240.

(c) *Gould v. Oliver*, *ubi supra*. Where a statute prohibits the carrying of a deck cargo on a particular voyage, the whole voyage is rendered illegal if cargo is carried on deck, and the insurance is vitiated, not merely as to so much of the cargo as is loaded on deck, but as to the whole cargo. *Cunard v. Hyde*, 2 E. & E. 1. This is not so, however, if the owner is ignorant of

benefit, but it is part of the adventure, and the losses must rest where the fortune of war casts them (*d*).

Loss must be
for general
safety.

The loss must be incurred for the *general safety of the ship and cargo*. Where the whole adventure was never in jeopardy, as where the goods lost consisted of corn which the captain was forced by a mob to sell at a low rate, although no injury was intended or done to any other part of the cargo, it was held that this was not a case for general average (*e*).

The sacrifice must also be successful to the extent of purchasing safety for some portion of the property embarked in the adventure; at least, unless this is the result, there is no right to contribution, nor, indeed, any fund out of which it can come (*f*).

What articles
contribute.

Of course the ship and freight contribute towards general average. The mariners do not contribute for their wages (*g*).

With respect to the goods which must contribute, the general rule has been stated to be, that all merchandize put on board for the purpose of traffic must contribute (*h*).

The ammunition and stores of the ship do not contribute; neither in ordinary cases do the provisions on board, even although the cargo consist entirely of passengers (*i*). Nor does the wearing apparel, luggage, jewels, or other property of this description, belonging to the passengers and crew, which is taken on board for use and not for traffic (*k*). But although these do not contribute, it is apprehended that if ammunition, provisions, passengers' luggage, or other goods which are exempt, are

the fact. *Wilson v. Rankin*, L. R., 1 Q. B. 162; *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581.

(*d*) See the judgment in *Taylor v. Curtis*, 6 Taunt. 608. The soundness of this rule, so far as it relates to merchant vessels, has been doubted. See Arnould on Insur. 913 (2nd edit.).

(*e*) *Nesbitt v. Lushington*, 4 T. R. 783; *Butler v. Wildman*, 3 B. & Ald. 398; and see *Job v. Langton*, 6 E. & B. 779, and the cases cited *ante*, p. 430.

(*f*) The equity of this limitation is strongly controverted by Mr. Benecké, who says, "No one has a right to attempt the preservation of the whole at the risk of an individual." See Benecké, *Princ. of Indemn.* 179. Doubtless this rule may lead occasionally to hardship, but it seems to flow from the very principle upon which the claim for general average depends. See 3 Kent Com.

235, and the American cases cited there. In pleading it has been usual to allege that the loss was incurred "in and about the preservation of the ship and cargo," or that they were preserved. See 2 Chit. Plead. 50, 7th edit.; *Gould v. Oliver*, 4 B. N. C. 134.

(*g*) 3 Kent Com. 241. In the single case of ransom the mariners' wages are chargeable. See *post*, p. 487, note (*d*).

(*h*) 1 Magens on Insur. 62; *Brown v. Stapylton*, 4 Bing. 119. *Deck goods* must, it seems, contribute, although they are generally not contributed for. Arnould on Ins. 936 (2nd edit.).

(*i*) *Brown v. Stapylton*, *ubi supra*.

(*k*) 1 Magens on Ins. 63; 3 Kent Com. 240. The rule of the Rhodian law and of the Basilican Constitutions was otherwise. See 1 Pardessus Lois

sacrificed for the general good, they must be paid for as other goods by general contribution.

Neither passengers, crew, nor convicts carried as passengers, can be called on to contribute for their personal safety; since, in accordance with the ancient rule of English law, there can be no estimation of the life of a man (*l*).

In adjusting the average, or calculating the values at which the articles which are to contribute are to be taken, different systems have been adopted at different times and places. Adjustment of average.

The value of the ship must be taken at the end of the voyage, and the freight which is chargeable consists of the clear earnings, after deducting the expenses of the voyage and wages of the crew (*m*).

The rule now adopted in England is to value the goods sacrificed as well as the goods saved at their selling price, if the ship arrives at her port of destination, and the valuation is made there; but if she puts back to her lading port, and the average is adjusted there, the invoice or cost price is taken, no other being well ascertainable. If from the condition of the goods which remain on board, or other circumstances, it may be assumed that the goods jettisoned would, had they remained on board, have arrived damaged, their value is to be taken at what they would have realized as damaged goods (*n*). It is obvious that the value of the property sacrificed ought to be included, for the owners of it are not to be indemnified completely, but only against all but their rateable share of the general loss (*o*).

Marit. 176, 227. And it may perhaps be inferred from the remarkable letters patent sent by King Edw. I. in 1285 to the Cinque Ports, which are cited by Pardessus (Lois Marit. vol. 4, p. 204), and which will be found in 2 Rymer's Fœdera, p. 298 (English edit.), that in England the strict rule of these ancient maritime systems was, at one time, acted upon.

(*l*) 1 Pardessus Lois Marit. 175; Abbott on Shipping, 356 (5th edit.).

(*m*) Stevens on Average, 59 (5th ed.). Where a charter-party provided that the freight was to be paid for every ton of goods that should be brought home, and an average loss was incurred in repairs on the outward voyage, it was held that the whole freight was liable to contribute, as the whole was eventually preserved to the owners by

the repairs. *Williams v. London Assurance Company*, 1 M. & S. 318. In the case of goods jettisoned, the shipowner must be allowed the freight which he would have earned on them. *Benecke, Princ. of Indemn.* 178. In *Frayes v. Worms*, 19 C. B., N. S. 159; 34 L. J., C. P. 274, it was held that where freight is prepaid, the charterer must contribute, as he has an interest in the cargo plus the freight advanced. *Id.*

(*n*) *Fletcher v. Alexander*, L. R., 3 C. P. 375. Where see also as to the effect of prepaid freight on the estimation of the average contribution.

(*o*) Abbott on Shipping, 358 (5th edit.); Smith Merc. Law, 295. As to the rule for adjusting average when it is not known whose goods are jettisoned, see *Spence v. The Union Marine Insurance Company*, L. R., 3 C. P. 427.

In estimating the value of masts, cables, and sails, it is usual to deduct one-third from new work for old (*p*). The value of the ship, if lost, should apparently be taken by deducting from her value at the port of departure a reasonable allowance for the wear and tear up to the time of the disaster (*q*).

To entitle a shipowner to an adjustment of general average, the voyage must have been terminated. A suspension of it at a foreign port for necessary repairs is not sufficient (*r*).

By what law
general aver-
age losses
calculated.

Where there is no special contract to disturb the general rule, losses by general average are to be calculated, as between the owner of the ship and the owner of the goods, according to the law at the port of discharge (*s*); but this rule will be often modified if the question arise on a contract made in England, for in this case the words will, at least *prima facie*, be held to have been used in the sense which is ordinarily given to them in England (*t*).

A clause is now frequently inserted in policies providing that general average shall be paid "as per foreign statement," or to the like effect; and where this is so, the parties are bound by the foreign adjustment, whether the loss incurred was a general average loss in this country or not (*u*). So, where a bill of lading provided that average should be adjusted "according to British custom," the shipper of the goods was held to be bound by such custom, although the practice of British average staters was at variance with the principle of general law, including that of England (*x*).

Mode of en-
forcing con-
tribution.

Contribution towards a general average might have been enforced by an action at common law (*y*), or by a suit in equity (*z*);

(*p*) See *post*, Chap. VII., INSURANCE, Part II.

(*q*) *Grainger v. Martin*, 31 L. J., Q. B. 186; 4 B. & S. 9; 3 Kent Com. 242. This is the ordinary rule in America. See further as to the details of adjustment, Arnould on Ins. 937 to 969 (2nd edit.), and Benecké, Princ. of Indemn.

(*r*) *Hill v. Wilson*, 4 C. P. D. 329.

(*s*) *Simonds v. White*, 2 B. & C. 805. See *Lloyd v. Guibert*, L. R., 1 Q. B. 116.

(*t*) *Power v. Whitmore*, 4 M. & S. 141.

(*u*) *Harris v. Scaramanga*, L. R., 7 C. P. 481; *Hendricks v. Australasian*

Insurance Company, L. R., 9 C. P. 460; *Mavro v. The Ocean Marine Insurance Company*, L. R., 9 C. P. 595; *S. C. Cam. Seacc.*, L. R., 10 C. P. 414. See also *Robinows v. Ewing's Trustees*, 3 Sess. Cases (4th series), 1134; and *Greer v. Poole*, 5 Q. B. D. 272.

(*x*) *Stewart v. The West India and Pacific Steamship Company*, L. R., 8 Q. B. 88; affirmed *ib.* 362. See also *Atwood v. Sellar*, 4 Q. B. Div. 432, affirmed, 5 Q. B. Div. 286.

(*y*) *Birkley v. Presgrave*, 1 East, 220; *Dobson v. Wilson*, 3 Camp. 480; *Gould v. Oliver*, 4 B. N. C. 134.

(*z*) *Sheppard v. Wright*, Show. P. C. 18.

but it would seem that the Court of Admiralty had usually no jurisdiction to entertain this question (*a*) ; unless, perhaps, where the whole of the proceeds of the ship, cargo, and freight was in the registry of the Court (*b*).

The shipowner has a right to retain the whole of the cargo liable to contribution for general average, and can require, before he parts with it, security for the due payment of the general average (*c*). In the case of a general ship, where there are many consignees, the usual course is for the master, before he delivers the goods, to take a bond or agreement from each consignee for the payment for what shall be found to be due for his proportion of the loss (*d*). If the shipowner delivers up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment, he may render himself liable to an action (*e*). Lien for general average.

Before paying a sum demanded for average, the person from whom contribution is claimed has a right to be satisfied that it is the result of a proper adjustment (*f*).

To an action by a shipowner against a shipper of goods to recover his proportion of an average loss, a plea stating that there never was any express promise to the effect mentioned in the declaration, that the ship was unseaworthy at the time of the commencement of the voyage, and that the average loss arose in consequence of such unseaworthiness, is good,—for it shows that the damage in respect of which the plaintiff claims contribution, resulted from his own negligence and misconduct (*g*).

(*a*) *The Constancia*, 4 Notes of Cases, 677. A claim for general average cannot be the subject of a bottomry bond. *The North Star*, Lush. 45; 29 L. J., Adm. 73. See also *The Cargo ex Galam*, Br. & L. 167.

(*b*) *The Constancia*, *ubi supra*; *The Packet*, 3 Mason (American) Rep. 255; *The Eleonora Catharina*, 4 Rob. 156.

(*c*) *Beawes*, Lex Mero. 244; Lord

Tenterden in *Scaife v. Toben*, 3 B. & Ad. 528.

(*d*) Abbott on Shipping, Part IV. Ch. x.

(*e*) *Crook v. Allen*, 5 Q. B. D. 38.

(*f*) See the judgment of the Judicial Committee of the Privy Council in *The Energie*, L. R., 6 P. C. 314.

(*g*) *Schloss v. Heriot*, 14 C. B., N. S. 59.

CHAPTER VII.

INSURANCE.

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GENERAL
NATURE OF
CONTRACT.

MARINE insurance is, with some qualifications, a contract of indemnity against certain perils or sea risks to which the ship, freight, or cargo, and the interests connected therewith, may be exposed during a particular voyage, or a fixed period of time (a); whereby, in the language of an old statute (b), "upon

(a) *Irving v. Manning*, 1 H. L. Cases, 307 and *Aitchison v. Lohre*, 4 App. Cases, 761; see *Kent v. Bird*, 2 Cowp. 583; also the notes to *Godsall v. Boldero*, 2 Smith, L. C. (7th edit.), 280, and *Darrell v. Tibbits*, 5 Q. B. D. 560, the case of a fire policy. See also *Dalby v. The India and London Life As-*

urance Company, 15 C. B. 365, where it was held (overruling *Godsall v. Boldero*), that the contract contained in a life policy is not a contract of indemnity, and *post*, p. 457.

(b) 43 Eliz. c. 12, now repealed by 26 & 27 Vict. c. 125. This act, after reciting the benefits of maritime in-

the loss or perishing of any ship there followeth not the undoing of any man, but the loss lighteth rather easily upon many, than heavily upon few."

To treat the subject of insurance fully, it would be necessary to consider at some length the maritime codes of foreign countries; but as this would require a space beyond the scope of the present work, the remarks upon it will be chiefly confined to the mode in which the contract has been dealt with by the Legislature and Courts of this country. In so doing it is proposed to arrange that portion of the subject which falls within the first division of this Chapter under the following heads:—1, *the parties to the contract*; 2, *the form and construction of policies, and their alteration*; 3, *open, and valued policies, time, voyage, and mixed policies*; 4, *re-insurance and double insurance*; 5, *the subject-matter of insurance*; 6, *the voyage, and the effects of delay and deviation*; 7, *the perils insured against*; and, 8, *the memorandum*; leaving the subjects of *warrantry, representation, and concealment, and of losses, adjustment, remedies on the policy, and return of the premium*, for consideration in the second part of this Chapter.

First, as to *the parties to the contract*.

The persons whose property is insured are called the *insured* or *assured*. Those who undertake to insure are called the *insurers, assurers or underwriters*.

Any number of persons may now be marine insurers. Formerly, ordinary partnerships or companies could not insure; for the exclusive right of insuring upon joint stock belonged, under the 6 Geo. 1, c. 18 (c), to two companies, namely, the Royal Exchange and the London Assurance Corporations. This privilege was, however, taken away by the 5 Geo. 4, c. 114, and insurance companies stand now upon the same footing, in all important respects, as private underwriters (d).

insurance, enabled the Lord Chancellor to direct a commission to the Judge of the Admiralty, the Recorder of London, two doctors of civil law, two common lawyers, and eight grave and discreet merchants, to make decrees in cases arising out of insurances. This Court, however, soon fell into disuse. An interesting account of the history of insurance, and of the writers upon it, will be found in Kent's Commentaries, vol. 3, p. 342. See also the Introduction to Park on Insurance, and the Introductory Lecture in Duer on Insurance.

(c) The preamble of this act recites the supposed advantages of this restriction. For instances of infringement of the privileges of these companies, see *Sullivan v. Greaves*, 1 Park, 8; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Booth v. Hodson*, 6 T. R. 405; *Aubert v. Maze*, 2 B. & P. 371. It was in order to avoid the effect of the charters granted to these companies that clubs of mutual insurers were established. See *Harrison v. Millar*, 7 T. R. 340, n.; *Strong v. Harvey*, 3 Bing. 304; and *post*, p. 443.

(d) By s. 2 of this act, the existing

Parties to contract.

Who may be insurers.

Who may be insured.

All persons, except alien enemies, may be insured. It was once doubted whether the latter also could not legally be insured (e); but it was decided in 1794, and it has ever since been held, that insurance upon the property of an enemy is repugnant to public policy, and consequently void (f); nor can an English insurance, even although effected before the commencement of hostilities, cover a loss by British capture (g). Where, however, a neutral subject had an interest in goods in common with one who was an alien enemy, and the former insured his part interest, it was held that he was entitled to recover (h). If, when the insurance is entered into, the insured is an alien, and after the loss he becomes an enemy, his right of action is only suspended in consequence of his personal *status* being changed, and it revives upon the return of peace (i). Where an enemy is allowed by royal licence to trade, insurances upon adventures within its protection are legalized (k): and if the assured is domiciled in this country, the disability to sue in our Courts in his own name is also removed (l).

Interest of assured.

It was not essential at common law that the insured should have any interest in the subject-matter of the insurance. Whether the insured had or had not any interest the insurance was valid; but unless the words "interest or no interest" were inserted in the policy, it was presumed that the insurance was on interest, and proof of it was necessary (m).

Wager policies on Eng-

To prevent the perversion of the contract, however, into a mere

rights of the two chartered companies, other than the exclusive right to insure, were expressly preserved. By Lloyd's Act, 1871 (34 Vict. c. xxi), the Society of Underwriters, and others, commonly known as Lloyd's is incorporated.

(e) See the judgment of Lord Hardwicke in *Henkle v. The Royal Exchange Assurance Company*, 1 Ves. 317; see also *Gist v. Mason*, 1 T. R. 85; and *post*, p. 467.

(f) *Brandon v. Nesbitt*, 6 T. R. 23.

(g) *Furtado v. Rodgers*, 3 B. & P. 191, which was decided upon the broad ground that all commercial intercourse with an enemy is illegal. *Potts v. Bell*, 8 T. R. 548, overruling *Bell v. Gibson*, 1 B. & P. 345; see also *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, *ib.* 407; *Flindt v. Waters*, 15 East, 260; *The Packet de Bilbao*, 2 Rob. 133; *Reid v. Hoskins*, 4 E. & B. 979; 5 E. & B. 720; *Esposito v. Bowden*, 4

E. & B. 963; *Avery v. Bowden*, 5 E. & B. 714; the temporary statutes, the 21 Geo. 2, c. 4, and the 33 Geo. 3, c. 27; and Phillips on Ins. c. 3, s. 2. Valin, speaking of our conduct during the war of 1756, when this country allowed insurances on the ships of the enemy, observes truly, "Mais il arrivait de là qu'une partie de la nation nous rendoit par l'effet de l'assurance ce que l'autre nous prenoit par le droit de la guerre." Comm. sur l'Ordon. de la Marine, liv. 3, tit. 6, art. 3.

(h) *Rotch v. Edie*, 6 T. R. 413.

(i) *Flindt v. Waters*, *ubi supra*. Such a defence, therefore, cannot be pleaded in bar. *ib.*; see also *Harman v. Kingston*, 3 Camp. 152.

(k) *Kensington v. Inglis*, 8 East, 273.

(l) *Usparicha v. Noble*, 13 East, 332.

(m) See the judgment of Chambre, J., in *Lucena v. Craufurd*, 3 B. & P. 101; S. C., 2 N. R. 269.

wager, it was provided by the 19 Geo. 2, c. 37, s. 1, that no assurance should be made by any person, bodies corporate or politic, on any ship belonging to his Majesty, or any of his subjects, or on any goods, merchandises, or effects laden, or to be laden, on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such assurance should be void (n). This statute applies to an insurance on profits on goods laden on board a ship (o).

Foreign ships are omitted from the provisions of the 19 Geo. 2, c. 37, owing, it has been said, to the difficulty of bringing witnesses from abroad to prove interest. Consequently insurances on foreign ships are valid, even although there is no interest, provided the policy is expressed on the face of it to be a wager policy (p).

It is not necessary, however, that the interest of the assured should exist at the time when the policy is effected; it is sufficient if he was interested during the risk and at the time of the loss (q). Thus the agent of a shipowner having authority can, by signing bills of lading subsequent to the policy, give to his principal an insurable interest in goods shipped at his risk (r). And in the case of a policy upon goods "lost or not lost," the assured may recover, although the goods receive damage before he acquired any interest in them; provided he bought them during the voyage, and without knowing that they were injured; for the contract is an indemnity against all *past* as well as all future losses (s). Nor is his insurable interest determined by

(n) By sect. 2 of the act, insurances on privateers fitted out by British subjects solely for the purpose of cruising against the enemy, may, notwithstanding the provisions of the act, be made for the owner's interest or no interest, free of average, and without benefit of salvage. See *supra*, p. 65, note (p). A policy containing any of the words forbidden by the 19 Geo. 2, c. 37, s. 1, is illegal if the policy does not exclude British vessels. *Allkins v. Jupe*, 2 C. P. D. 375.

(o) *Smith v. Reynolds*, 1 H. & N. 221; *De Mattos v. North*, L. R., 3 Exch. 185. In the latter case the policy which contained the words "Warranted free from all average, but

without benefit of salvage," was held void. So also where the policy contained the additional words "but to pay loss on such parts as shall not arrive." *Allkins v. Jupe*, *ubi supra*. See also *post*, p. 462.

(p) See *Theilsson v. Fletcher*, 1 Dougl. 315; *Craufurd v. Hunter*, 8 T. R. 13; *Lucena v. Craufurd*, *ubi supra*; *Nantes v. Thompson*, 2 East, 385, overruled by *Cousin v. Nantes*, 3 Taunt. 512.

(q) *Rhind v. Wilkinson*, 2 Taunt. 237.

(r) *Stephens v. The Australasian Insurance Company*, L. R., 8 C. P. 18.

(s) *Sutherland v. Pratt*, 11 M. & W. 296. See also *Hastie v. Couturier*, 9 Exch. 109.

his parting, *after* the loss, with the property insured; since he may sue as trustee for the person to whom it has passed (*t*). Where, however, the assured parted *before* the loss with the ship insured, and it did not appear that there was any agreement that the policy should be kept alive for the benefit of the assignee, it was held that the assured could not recover (*u*).

Where an insurance is on goods to be shipped, it is material to note the precise time at which the risk commences. Where by the terms of the contract of sale the property does not pass until the loading of the cargo is completed, the buyer cannot insure before the completion of the loading. The mere option which the buyer in such a case would possess to take so much of the cargo as was loaded, does not confer such an interest in the cargo as would be sufficient to support a policy on profits (*y*).

What interest
sufficient
generally;

An interest insurable against a peril must be such a one that the peril would, by its proximate effect, cause damage to the assured. Thus a mere agent, without possession or lien, has not an insurable interest to the extent of the value of goods shipped, simply because his name appears in the bill of lading instead of that of his principal (*y*).

In policies
under
Passengers
Acts and
Merchant
Shipping
Acts.

By the Passengers Act, 1855, no policy of assurance effected in respect of any passages, or of any passage or compensation money, by any person by that act made liable in certain events to provide such passages or to pay such money, or in respect of any other risk under that act, is invalid by reason of the nature of the risk or interest (*z*). So, by the 55th section of the Merchant Shipping Act, 1862, insurances effected by shipowners in respect of their liability for loss of life or personal injury, or

(*t*) *Sparkes v. Marshall*, 2 B. N. C. 761.

(*u*) *Powles v. Innes*, 11 M. & W. 10.

(*x*) *Anderson v. Morice*, L. R., 10 C. P. 609 (affirmed, 1 App. Cases, 713). See also *Dixon v. Whitworth*, 4 C. P. D. 375; W. N. 1880, p. 43, and *post*, p. 462. In *Joyce v. Swan*, 17 C. B., N. S. 84, Willes, J., expressed an opinion that where goods were shipped with the intention of fulfilling an order, the vendee might insure his interest although the property in them had not (by reason of special circumstances) passed to him. See also per Willes, J., in *Seagrave v. The Union Marine Insurance*, L. R., 1 C. P. 309. As to when the property passes on a sale of goods, see the judgment

of Sir C. Cresswell in *Gilmour v. Supple*, 11 Moo. P. C. 551; and Benjamin on Sale, B. 2, c. 2; *Martineau v. Kitching*, L. R., 7 Q. B. 436; *The North British & Mercantile Insurance Co. v. Moffat*, L. R., 7 C. P. 25. The interest of a person only equitably entitled is insurable, *Ex parte Houghton*, 17 Vesey, 253. So a mortgagor of a ship, if in possession, is entitled to insure to the extent of the value of the ship, *The Provincial Insurance of Canada v. Leduc*, L. R., 6 C. P. 244.

(*y*) *Seagrave v. The Union Marine Insurance*, L. R., 1 C. P. 305.

(*z*) 18 & 19 Vict. c. 119, s. 55. Appendix, p. exviii.

damage or loss to ships or goods, occurring without their actual fault or privity, are not to be deemed invalid by reason of the nature of the risk (a).

Policies are usually effected by brokers who are employed by the assured (b). Indeed it would be nearly impossible for the merchant or shipowner to act for himself in effecting insurances, owing to the complexity of the modern system of insurance, and the peculiar knowledge which is requisite in this matter. The broker is the agent of the assured to effect the policy; yet he is not solely his agent, for he is a principal to receive the premium from the assured, and pay it to the underwriter (c), and is liable to the latter for it (d).

Mode of
effecting in-
surances.

Insurance on ships is often effected by means of mutual insurance associations or clubs. Shipowners being members of these, enter their vessels from year to year, subject to the special rules of the particular club (e).

Mutual
insurance.

(a) M. S. Act, 1862, s. 55. See *post*, p. 446.

(b) A person could neither sue on a policy which was not made with him personally, nor with an agent authorized at the time on his behalf. *Watson v. Swann*, 11 C. B., N. S. 756; but see now 31 & 32 Vict. c. 86, enabling policies to be assigned; see also *Lloyd v. Fleming*, L. R., 7 Q. B. 299; *Pellias v. The Neptune Marine Insurance Company*, 4 C. P. D. 139; 5 C. P. D. 34. Policies are often underwritten by brokers or agents acting for underwriters. Where this is the case the agent has no power to underwrite for sums beyond the limit imposed on him by his principal, and should he do so the assured will not be able to recover from the principal any part of the amount underwritten for such a contract is indivisible, and if part is not recoverable the whole is not. *Baines v. Ewing*, L. R., 1 Ex. 320. As to the commission payable to brokers, see *The Great Western Insurance Company of New York v. Cunliffe*, L. R., 9 Ch. 525.

(c) See the judgment of Lord Ellenborough in *Jenkins v. Power*, 6 M. & S. 287. The policy always contains an admission by the underwriter of the receipt of the premium, although the practice is, that it is not in fact paid, but allowed in account between the underwriter and the broker. The effect of this is, that there is no remedy for it against the assured, if it is not properly allowed by the broker. *Ib.*; *Dalzell v. Mair*, 1

Camp. 532. As to what constitutes a delivery of a policy, see *Xenos v. Wickham*, 13 C. B., N. S. 381; *S. C.* in Cam. Scacc., 14 C. B., N. S. 435; Dom. Proc., L. R., 2 H. L. 296. The fact that instructions have been given for an insurance and that a "slip" has been obtained, is not a sufficient compliance with an agreement to keep a ship insured. See *Parry v. The Great Ship Company*, 4 B. & S. 556; see also *post*, pp. 449, 450.

(d) See *per* Bayley, J., in *Power v. Butcher*, 10 B. & C. 340.

(e) The rules of these associations are mostly very imperfect, and though they may effect their intention where the members are known to and have confidence in each other, they are ill adapted to give rights which require to be enforced by legal tribunals. Questions often arise as to the construction of the rules. These are usually decided by arbitration, and as the rules of the different associations vary in language, the decisions upon them are of little general value. By the rules of some of these societies, the assured, if he mortgages his vessel, must, at the peril of forfeiting his claim under the policy, deliver to the insurers a deed containing a covenant by the mortgagee to pay the premium. This rule must be strictly adhered to. See *Turnbull v. Woolfe*, 11 W. R. 55, overruling the decision of Stuart, V.-C., 3 Giff. 91. Formerly in some of these clubs no policy was issued.

Lien of insurance broker.

An insurance broker has a lien upon the policy which he effects. If he be employed immediately by the assured, this lien extends to the general balance due (*f*). Where, however, the broker is employed by an intermediate agent who he knows to be such, his right of lien extends only to premiums and commissions relating to the particular transaction (*g*). This right of lien may, as in other cases, be superseded by a special contract or course of dealing. A mere arrangement, however, whereby the broker is paid upon a monthly account, but does not deliver up the policies before payment, will not affect the right of lien (*h*); and this is so although the policies were effected through an intermediate agent, known by the broker to be such, who was paid by the principal, but failed to pay the broker (*i*).

FORM AND CONSTRUCTION OF POLICIES AND THEIR ALTERATION.

Secondly, as to the form and construction of policies and their alteration.

The form of marine policy used in this country has varied little for more than two hundred years.

Ordinary form of policy.

The following is the ordinary form now in use at Lloyds:—

In the name of God. Amen. as well in
own name, as for and in the name and names of all and
every other person or persons to whom the same doth,
may, or shall appertain, in part or in all, doth make assur-
ance, and cause and them, and every of them, to be
insured, lost or not lost, at and from upon any kind
of goods and merchandizes, and also upon the body, tackle,
apparel, ordnance, munition, artillery, boat, and other fur-

In *Bromley v. Williams*, 32 Beav. 177, the Master of the Rolls was inclined to the opinion that no policy was necessary. The contrary, however, was held in *In re The London Marine Insurance Association*, L. R., 4 Ch. 611. See also *Blythe & Company's case*, *In re Albert Average Association*, L. R., 13 Eq. 529. It has, however, been held in a case where one of these clubs was being wound up, and it appeared that the books of the club contained admissions that the club was liable for the payment of the amount insured, that the assured was entitled to rank as a creditor for the amount of the insurance, notwithstanding that the policy on which the claim arose was unstamped, and was, therefore, inadmissible in evidence. *In re Teignmouth and General Mutual Shipping Association*, L. R., 14 Eq. 148. As to the stringent provi-

sions of the 30 Vict. c. 23, on this point, see *post*, p. 448. As to the rights of members of these associations, see further *In re London Marine Insurance Association, Andrews' Case*, L. R., 8 Eq. 176; *Gray v. Pearson*, L. R., 5 C. P. 568; *Wood v. Wood*, L. R., 9 Ex. 190; *Evans v. Hooper*, L. R., 1 Q. B. D. 45; *Edwards v. The Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563. As to the renewal of club policies, see *Cory v. Paton*, L. R., 7 Q. B. 304; *Lishman v. The Northern Maritime Insurance Company*, L. R., 10 C. P. 179. *Forwood v. The North Wales Mutual Marine Insurance Company*, 5 Q. B. D. 87.

(*f*) *Ollive v. Smith*, 5 Taunt. 55; *Phillips on Insurance*, s. 1909.

(*g*) *Westwood v. Bell*, 4 Camp. 352.

(*h*) *Fisher v. Smith*, 4 App. Cas. 1.

(*i*) *Ibid.*

niture, of and in the good ship or vessel, called the whereof is master, under God, for this present voyage or whosoever else shall go for master in, the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandizes, from the loading thereof aboard the said ship, upon the said ship, &c. and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever, shall be arrived at upon the said ship, &c. until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandizes, until the same be there discharged, and safely landed. And it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to, and touch and stay at, any port or places whatsoever, without prejudice to this insurance. The said ship, &c., goods and merchandizes, &c., for so much as concerns the assureds, by agreement between the assureds and assurers in this policy, are and shall be valued at .

Touching the adventures and perils which we the assurers are contented to bear, and do take upon us in this voyage; they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes and people, of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandizes, and ship, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandizes, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured (k). And it is agreed

(k) See as to this clause, which is known as "the suing and labouring clause," *post*, p. 490.

vessel, and the assureds shall in consequence thereof become liable to pay, and shall pay, any sum or sums not exceeding the value of the said vessel hereby assured, We, the Assurers, will severally pay the assureds such proportions of three-fourths of the sum so paid, as our respective subscriptions hereto bear to the insured value of the said vessel. And in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid.

But this agreement is in no case to be construed as extending to any sums the assureds may become liable to pay, or shall pay, in respect to loss of life or personal injury to individuals from any cause whatever.

The essential parts of the contract are as follows:—The stamp; the name of the assured; the ship; the subject-matter of insurance; the voyage; the perils insured against; the premium; the memorandum; and the subscription.

The statutes at present in force which relate to the stamping of marine policies are the 30 Vict. c. 23, one of the schedules to which Act now regulates the amount of duty payable (n), the 33 & 34 Vict. c. 97, s. 117, and the 39 Vict. c. 6 (o).

The following provisions, many of which are new, are contained in these Acts.

No contract or agreement for sea insurance (p) (other than such insurance as is referred to in section 55 of "The Merchant

(n) 30 Vict. c. 23, Schedule B. The duties charged under this act are at the rate of:—for every 100*l.* or fraction of 100*l.* insured, upon any voyage, 3*d.*; for any time not exceeding six months, 3*d.*; not exceeding twelve months, 6*d.* See Appendix, pp. cclxvi, cclxx. The principal statutes in force before the Act were the 35 Geo. 3, c. 63, and the 7 & 8 Vict. c. 21. By Schedule D. of 30 Vict. c. 23, the 35 Geo. 3, c. 63, and s. 4, and the schedule of 7 & 8 Vict. c. 21 (being the only provisions of that Act relating to marine insurance), are repealed.

(o) Appendix, p. cccxxv.

(p) By sect. 4 of the 30 Vict. c. 23, the expression "sea insurance"

means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever, on board of any ship or vessel, or upon the freight of or any other interest which may be lawfully insured in or relating to any ship or vessel; and the word "policy" means any instrument whereby a contract or agreement for any sea insurance is made or entered into. See also sect. 12. And by sect. 5, the Commissioners of Inland Revenue are to provide blank policies, printed on paper, in the form set forth in

Shipping Act, 1862" (q)) is valid unless it is expressed in a policy; and every policy must specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured. If any of these particulars are omitted the policy is void (r).

Where an insurance is made for a voyage and also for time, or to extend to or cover any time beyond twenty-four hours after the ship has arrived at her destination and been there moored at anchor, the policy is chargeable with the duty both of a voyage and of a time policy (s).

Where carriers by sea or other persons, in consideration of the payment of money for additional freight or otherwise, undertake any risk attending goods, merchandize or property on board a ship, or indemnify the owner against any risk, loss or damage, such agreement or engagement is a contract for sea insurance (t).

Invalidity of
unstamped
policy.

No policy may be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in equity, unless duly stamped; and until recently the Commissioners of Inland Revenue could not stamp any policy executed within the United Kingdom at any time after it was signed or underwritten, except for the purpose of adding an additional stamp or stamps, to a policy of mutual insurance, where such policy had not been signed or underwritten to an amount exceeding the sum which the stamp previously impressed warranted (u); but by the Act of 1876 (39 Vict. c. 6) a policy of sea insurance is included within the provisions of the 16th section of the Stamp Act, 1870, and may be stamped after execution on payment of a penalty of 100*l.* (x).

Schedule E. to the Act, which any person may buy, stamped with the requisite duty. The day, month and year of the issue must previously be marked or written on the policy. Sect. 6 provides that the Commissioners must keep an office in London for this purpose. By sect. 17, allowance may be made for spoiled, obliterated, or unused policies. Formerly, under 35 Geo. 3, c. 63, s. 10, allowance could be made where there was an over-insurance upon a homeward voyage. This is not provided for by the present Act.

A policy, by which the separate and distinct interests of two or more

persons are insured, being stamped in respect of their aggregate but not in respect of each of their interests, may be stamped with an additional stamp or stamps, within a month after the last risk has been declared. See 39 Vict. c. 6, s. 1, Appendix, p. cccxxvi.

(q) See as to this, *ante*, pp. 442, 446.

(r) 30 Vict. c. 23, s. 7.

(s) *Ib.* s. 11.

(t) *Ib.* s. 12.

(u) *Ib.* s. 9.

(x) See 33 & 34 Vict. c. 97, s. 16, which enables the officer in Court to stamp an instrument upon a trial.

Under the provisions of the Stamp Act, 1870, any policy made or executed out of, but being in any manner enforceable within, the United Kingdom is chargeable with duty under the 30 Vict. c. 23, and may be stamped within the period of two months next after it shall have been received in the United Kingdom (y).

Stamps on policies executed abroad.

No policy may be made for any time exceeding twelve months (z).

Duration of time policies.

Prior to the execution of the stamped policy a memorandum of the terms of the proposed policy is generally initialed by the underwriters (a). This memorandum is what is commonly called "the slip," and various questions have from time to time arisen as to its effect.

Effect of the "slip."

Whilst the Acts relating to the stamping of marine insurances in force before the 30 Vict. c. 23, remained unrepealed, it was held that the Courts could not look at "the slip" for any purpose (b). The 30 Vict. c. 23, provides that a contract of marine insurance, except when made under the Merchant Shipping Acts, shall be void unless expressed in a policy, and that no policy, unless stamped, shall be available either at law or in equity; and it seems that now a slip, although still, except in the case above mentioned, not enforceable, or admissible as evidence of a contract of marine insurance, may be given in evidence for collateral purposes. Thus, in order to ascertain whether there has been undue concealment on the part of the assured, the Court may, in an action on a duly stamped policy, look at the slip. It has been held that, as the slip is in practice, and according to the understanding of

(y) 33 & 34 Vict. c. 97, s. 117. The 30 Vict. c. 23 contains, in sects. 13, 14, 15 and 16, provisions making liable to a penalty of 100*l.* persons who pay upon any loss unless the insurance is written and stamped, or who enter into any contract, memorandum, or agreement for sea insurance unless such insurance is in writing and stamped, or issue copies of policies which are not stamped, and prohibiting brokers or agents making charges unless the policy is in writing and stamped. See, as to these sections, *Stowe v. Querner*, L. R., 5 Ex. 165.

(z) 30 Vict. c. 23, s. 8.

(a) See *Xenos v. Wickham*, 33 L. J., C. P. 13; *Perry v. The Great Ship Co.*,

33 L. J., Q. B. 41. The initials f. p. a., f. g. a., and f. o. s. are sometimes written on the "slip." These abbreviations signify that the proposed insurance is to be made "free of particular average," "free of general average," or "free of capture and seizure." *Fisher v. The Liverpool Marine Insurance Co.*, L. R., 7 Q. B. 471.

(b) 35 Geo. 3, c. 63, ss. 17 and 18, and 7 & 8 Vict. c. 21, s. 4, both of which are repealed by 30 Vict. c. 23. These provisions did not give any validity to slips. See *Marsden v. Reid*, 3 East, 572; *Warwick v. Slade*, 3 Camp. 127; *Pattison v. Mills*, 2 Bligh, N. S. 562; *The Morocco Land and Trading Co. v. Fry*, 11 Jurist, N. S. 76.

X

those engaged in maritime assurance, the complete and final contract between the parties, the assured need not communicate to the underwriters facts which come to his knowledge after the slip has been initialed and before the policy has been executed (*y*). But a stamped policy is essential to a valid contract of insurance, and it has been held that the initialing of a slip and forwarding it to the broker of the assured are parts of one entire contract void under the statute, and so, although the broker pays the premium and the amount of the stamp duty to the agent of the underwriter, no further contract to execute a stamped policy can be implied, and therefore the assured, if there be no stamped policy, is without remedy (*z*).

The effect of the alteration of a policy is mentioned below (*a*).

The name of
the assured.

The legislature has provided that it shall not be lawful to effect a policy on any ship, goods, or other property, unless the name or the usual style and firm of dealing of one or more of the persons interested, or of the consignor or consignee of the property insured, or of the person residing in Great Britain who receives the order for effecting the policy, or of the person who gives the order to the agent immediately employed to effect it, is inserted in it (*b*). This enactment has met with a liberal construction; and it has been held that a policy effected in the name of the general agents of the consignor, who receive a cargo upon the refusal of the consignee to accept it, is valid; and that if, acting upon the clear intention of the consignor, although without his express authority, they effect an insurance as his agents, or if their act is subsequently ratified by their principal, they may recover on the policy (*c*). Nor is it neces-

(*y*) *Ionides v. The Pacific Fire and Marine Insurance Company*, L. R., 6 Q. B. 674; affirmed, L. R., 7 Q. B. 517; *Cory v. Patton*, L. R., 7 Q. B. 304; L. R., 9 Q. B. 577; *Lishman v. The Northern Marine Insurance Company*, L. R., 8 C. P. 216; L. R., 10 C. P. 179.

(*z*) *Fisher v. Liverpool Marine Insurance Company*, L. R., 8 Q. B. 469; affirmed on appeal, L. R., 9 Q. B. 418. See also *Mackenzie v. Coulson*, L. R., 8 Eq. 368, observed upon in *Cory v. Patton*, L. R., 7 Q. B. 304.

(*a*) See *post*, p. 453.

(*b*) 28 Geo. 3, c. 56. An earlier statute, the 25 Geo. 3, c. 44, which was repealed by this act, was passed to prevent the effecting of policies in blank, and required that the names of

the persons interested, or of the agent who effected the policy, should be inserted. See *Cox v. Parry*, 1 T. R. 464, and *Pray v. Edie*, *ib.* 313.

(*c*) *Wolff v. Horncastle*, 1 B. & P. 316; *Lucena v. Craufurd*, 3 B. & P. 75; 2 N. R. 269; *Stirling v. Vaughan*, 11 East, 619; *Routh v. Thompson*, 13 East, 274; *Hagedorn v. Oliverson*, 2 M. & S. 485; *Barlow v. Leckie*, 4 J. B. Moore, 8; and see *Bell v. Janson*, 1 M. & S. 201, where it was held that a letter directing assurance could not be considered to be a ratification of an insurance which had been actually made at the time, but without the knowledge of the principal. See also *Browning v. The Provincial Insurance Company of Canada*, L. R., 5 P. C. 263.

sary that an agent effecting the policy should be described in it as such (d).

Where a broker had received directions from the owner of goods to insure them, and being unable to do so caused the risk to be indorsed upon a general policy which had been previously effected by the agents of the broker, in their own names, upon goods "to be valued and declared as interest might appear," and this indorsement was initialed by the underwriter, and the goods owner was informed of it, it was held that the policy not having been made by the owner of the goods, or by any one authorized on his behalf at the time, and not having been ratified by him, he could not sue upon it (e).

A description of the subject matter of the insurance is required both from the nature of the contract and from the universal practice of underwriters (f). Subject matter.

There is no express regulation in this country which requires that the name of the vessel insured, or of her master, shall be inserted in the policy; it has been usual, however, either where the policy relates to a particular ship or to goods to be carried by a particular ship, to insert the name of the ship, since a knowledge of it is often material for the estimation of the risk to be insured. A policy on a ship "called the American ship President, or by whatever other name the same ship should be called," was held to be a valid policy on a vessel which was an American ship, and of which the real name was "*The President*" (g). The name of the ship.

The validity of insurances upon goods to be shipped by "ship or ships" without naming them has long been established (h); and

(d) *De Vignier v. Swanson*, 1 B. & P. 346, note. Where the persons interested were described as "the trustees of Messrs. K. & Co.," it was held that this might be considered to be their usual style and form of dealing. *Hibbert v. Martin*, 1 Camp. 538. The statute does not prevent an assured from recovering against persons who are engaged as partners in underwriting, though each has signed in his own name for a distinct sum. *Brett v. Beckwith*, 26 L. J., Chan. 130.

(e) *Watson v. Swan*, 11 C. B., N.S. 750. The Court in this case abstained

from expressing any opinion as to whether an action could not have been maintained by the broker as trustee for his principal.

(f) See *Mackenzie v. Whitworth*, 1 Ex. D. 40.

(g) *Le Mesurier v. Vaughan*, 6 East, 382, and *Hall v. Molineaux*, cited *ib.* 385; see also *Clapham v. Cologan*, 3 Camp. 382. In *Ionides v. The Pacific Insurance Company*, L. R., 6 Q. B. 674; 7 Q. B. 517, it was held that a mistake in the name of the ship is immaterial if the underwriter cannot be prejudiced.

(h) See *post*, p. 457, n. (x).

where a policy is effected in this form it attaches as soon as the goods are shipped, and it becomes the duty of the insured, as soon as he becomes aware of the shipment, to inform the underwriter by declaring the goods (*g*). It has been doubted whether such an insurance does not amount to a warranty that the party effecting it is ignorant of the name of the vessel; but however this may be, it is clear that if the effect of withholding the name is to deprive the underwriter of any material information, the concealment avoids the policy (*h*). Where an insurance is on cargo, it will extend, although the ship is named in the policy, to any other ship into which it may be properly shifted (*i*).

Where policy
on cargo.

The name of
the master.

After naming the ship and appurtenances, the policy, as we have seen, mentions the master. This portion of the policy is so simple, and the liberty given by it to the assured is so extensive, that no questions have arisen out of it, nor does it call for further notice.

The pre-
mium.

The premium is the amount paid by the assured to the underwriter, as a consideration for his undertaking the risk. The 35 Geo. 3, c. 63, s. 11, required that the premium "paid, given or contracted for upon the insurance," should be expressed in the policy. But that Act has been repealed, and the present Acts relating to the stamping of marine policies contain no similar provision. The broker is, as we have seen, the person to whom the underwriter looks for its payment (*j*). As between the assured and the underwriter, the receipt which is always inserted in the policy has been held to be conclusive evidence of the receipt of the premium by the latter (*k*); except, indeed, in the case of fraud (*l*).

The subscrip-
tion.

The 30 Vict. c. 23, s. 7, requires, as we have seen (*m*), that the names of the subscribers and underwriters and sums insured should be specified on the policy; otherwise the policy is void. It is not necessary, however, that a policy under-

(*g*) *Kewley v. Ryan*, 2 H. Bl. 343; *Henchman v. Offley*, *ib.* 345, note; *Gledstanes v. The Royal Exch. Assur.*, 6 B. & S. 797; 34 L. T., N. S. 30; *Stephens v. The Australasian Insurance Company*, L. R., 8 C. P. 18. See also *The Imperial Marine Insurance Co. v. The Fire Insurance Corporation*, 4 C. P. D. 166.

(*h*) *Lynch v. Hamilton*, 3 Taunt. 37, confirmed on error; *Lynch v. Duns-*

ford, 14 East, 494.

(*i*) *Plantamour v. Staples*, 1 T. R. 611, note. See of transhipment generally, *ante*, p. 321, and *Oliverson v. Brightman*, 8 Q. B. 781.

(*j*) *Ante*, p. 443.

(*k*) *Dalzell v. Mair*, 1 Camp. 532; *De Gaminde v. Pigou*, 4 Taunt. 246.

(*l*) *Foy v. Bell*, 3 Taunt. 493; see also *Macor v. Simeon*, *ib.* 497.

(*m*) *Ante*, p. 448.

written by a company or co-partnership should be signed by every member; it is sufficient if it be subscribed in the name of the firm (*n*). But where a policy is signed per procuration of the several members of an unregistered society it is void, if it does not specify the names of the several members (*o*).

Any material alteration in a policy, as in any other contract, mercantile instrument, or deed, even although made by a stranger, has the effect of making it void, as against all parties who did not authorize the alteration (*p*). A person, therefore, who desires a change in the terms of the policy should obtain the concurrence of the other parties to it before the insertion of the alteration. A material alteration, however, made by the assured cannot be set up by him, and will not entitle him to claim a return of premium (*q*). An alteration which is immaterial does not vacate the policy, and those parties who did not consent to it remain liable on the original contract (*r*). The most usual mode of making a material alteration in a policy is by a memorandum on the back of it; and the signatures or initials of the parties are commonly appended. If the alteration be required for the purpose of remedying an error, the Chancery Division has jurisdiction to effect it (*s*).

The 30 Vict. c. 23, s. 10, enacts, that the provisions of that act shall not prevent "the making of any alteration which may lawfully be made in the terms and conditions of any policy, after the same shall have been underwritten, provided that such alteration be made before notice of the determination of the risk originally insured, and that it shall not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period

Alteration of policy.

Under 30 Vict. c. 23.

(*n*) *Reid v. Allan*, 4 Ex. 326; *Dowdall v. Allan*, 19 L. J., Q. B. 41; decisions upon similar words in the 35 Geo. 3, c. 63.

(*o*) *In re Arthur Average Association, Ex parte Hargrave & Co.*, L. R., 10 Ch. 542.

(*p*) *Master v. Miller*, 4 T. R. 320; *S. C.*, 1 Smith, L. C. (7th edit.) 871; *Fairlie v. Christie*, 7 Taunt. 416; *Campbell v. Christie*, 2 Stark. 64; *Forshaw v. Chabert*, 3 B. & B. 158; *Davidson v. Cooper*, 11 M. & W. 778; *S. C.*, 13 M. & W. 343; *Crookewit v. Fletcher*,

1 H. & N. 893.

(*q*) *Langhorn v. Cologan*, 4 Taunt. 330.

(*r*) *Sanderson v. M'Cullom*, 4 J. B. Moore, 5; *Sanderson v. Symonds*, 1 B. & B. 426. See also the remarks upon the principle of these cases in the judgment in *Aldous v. Cornwell*, L. R., 3 Q. B. 673.

(*s*) *Motteux v. London Assurance Company*, 1 Atk. 545; Judicature Act, 1873, s. 37; *Clark v. Girdicood*, 7 Ch. D. 9; *Henkle v. Royal Exchange Assurance Company*, 1 Ves. 317.

allowed by this Act in the case of a policy made for a greater period than six months, and that the articles insured shall remain the property of the same person or persons, and that no additional or further sum shall be insured by reason or means of such alteration." A provision similar to this contained in an earlier Act has received a liberal construction (u). A mistake made in the ship's name might have been rectified (x); the time of sailing might have been altered or extended (y); and a change of destination might have been inserted, if made before notice of the determination of the risk (z). But where an insurance made upon "the ship and outfit" was afterwards altered by consent, by substituting the words "the ship and goods," it was held that a new stamp was necessary (a).

Where, however, a policy was effected, by mistake, on the goods instead of on the ship, and the parties never intended to enter into the contract in its original form, it was held that an alteration making the terms of the contract agree with the real intention of the parties did not render a new stamp requisite (b). A policy cannot be altered so as to bring it within a class requiring a higher duty (c).

Where the alteration renders a new stamp necessary the parties cannot recover upon the policy in its original state; since the alteration, although ineffectual to form a new agreement, proves an intention to abandon the former contract (d).

Delivery of the policy.

Where there is no complete delivery of a policy under seal to the assured, the insurers are not liable on it; but it is not necessary in order to make the delivery complete that the assured should formally accept or take away the policy. In fact, it is a common practice of insurance companies to retain the policy until sent for by the assured or his broker (e).

(u) 35 Geo. 3, c. 63, s. 13. See *Brockelbank v. Sugrue*, 1 B. & Ad. 88.

(x) *Robinson v. Touray*, 3 Camp. 158; 1 M. & S. 217; see *Cole v. Parkin*, 12 East, 471.

(y) *Kensington v. Inglis*, 8 East, 273; *Hubbard v. Jackson*, 4 Taunt. 169; *Hair v. Aberdeen*, 2 B. & A. 320; *Riddale v. Shelden*, 4 Camp. 107.

(z) *Ramstrom v. Bell*, 5 M. & S. 267; *Brockelbank v. Sugrue*, *ubi supra*.

(a) *Hill v. Potter*, 8 East, 373.

(b) *Sawtell v. Loudon*, 5 Taunt. 399.

(c) See the judgment of Lord Tenterden in *Brockelbank v. Sugrue*, *supra*.

(d) *French v. Patten*, 1 Camp. 721;

S. C., 9 East, 351.

(e) *Xenos v. Wickham*, 13 C. B., N.S. 381; *S. C.*, in Cam. Soc., 14 C. B., N. S. 435, and Dom. Proc., L. R., 2 H. L. 296. In this case the policy had been actually executed by the directors of the company, but had been retained by them in their possession, and there was a difference of opinion between the judges in the Exchequer Chamber, as to whether, looking at the course of business, the policy had, in fact, been delivered or not. The House of Lords held, that the policy was delivered so as to bind the defendant.

A policy of insurance is considered as a contract *uberrimæ fidei*, and always receives a liberal construction for the benefit of trade, and for the assured (*f*). The same rule of construction, applies, however, to it as to all other instruments, namely, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intentions of the parties to that contract, be understood in some other special and peculiar sense (*g*). Where, therefore, the policy is ambiguous in its terms, or contains nothing which expressly rebuts the construction, it will be understood as referring to what is usually done by such a ship, with such a cargo, on such a voyage (*h*); for it is presumed that every underwriter is acquainted with the practice of the trade in which he insures (*i*). Thus, evidence was held to be properly received of a custom that, under the usual form of policy, underwriters are not liable for general average in respect of the jettison of goods stowed on deck (*k*).

Construction
of the con-
tract

If the usage is general, the policy is governed by it, although the trade which it affects is of recent origin (*l*). As, however, evidence of usage is admissible only upon the ground that the parties contracting are presumed to have been aware of its

Effect of
evidence of
usage.

(*f*) 2 W. Saund. 200, n. (1); and the judgment of Buller, J., in *Wolff v. Horncastle*, 1 B. & P. 322; *Pearson v. The Commercial Union Insurance Company*, 15 C. B., N. S. 304; 1 App. Cases, 498.

(*g*) *Per* Lord Ellenborough in *Roberts v. French*, 4 East, 136; see also *Trueman v. Loder*, 11 A. & E. 689, and *per* Erle, C. J., in *Carr v. Montefiore*, 5 B. & S. 428.

(*h*) See the judgment of Lord Mansfield in *Pelly v. The Royal Exchange Assurance Company*, 1 Burr. 350. In a recent case it was held, that the construction of a policy could not be varied by a correspondence between the assured and their agents who effected the insurance, which was not referred to in the policy, but of which the underwriters had notice; *Halhead v.*

Young, 6 E. & B. 312.

(*i*) See *per* Lord Mansfield in *Noble v. Kennoway*, 2 Doug. 512; see also *Letheulier's Case*, 2 Salk. 443; *Salvador v. Hopkins*, 3 Burr. 1707; *Grant v. Paxton*, 1 Taunt. 463; *Robertson v. Clarke*, 1 Bing. 445; *Vallance v. Dewar*, 1 Camp. 503, and the cases cited *ib.* 506, note; *Chaurand v. Angerstein*, Peake, 43; *Gould v. Oliver*, 4 Bing. N. C. 134; *Milward v. Hibbert*, 3 Q. B. 120; *Lewis v. Marshall*, 7 M. & Gr. 729; *The Imperial Marine Insurance Company v. The Fire Insurance Corporation*, 4 C. P. D. 166; and *ante*, p. 294.

(*k*) *Miller v. Tetherington*, 6 H. & N. 278; *S. C.*, in *Cam. Scacco*, 7 H. & N. 954.

(*l*) *Noble v. Kennoway*, *ubi supra*.

existence, and consequently to have entered into the policy subject to its effect, the usage must be general, either to all trades, or to the particular trade in respect of which the insurance is made. An usage, therefore, at Lloyd's is not binding upon an assured when it is not known to him, although his broker may have been aware of it (*m*). If the terms of a policy are plain and unambiguous, evidence of an usage which would contradict instead of explaining them is inadmissible. Thus, where a policy on a ship was in the usual form, including "boats," evidence of an usage not to pay upon a loss of boats slung outside upon the quarters of the vessel was excluded (*n*). So, where a policy stated that the insurance on the ship should continue until she was moored twenty-four hours, and on the goods till safely landed, it was held that evidence of an usage that the risk on the goods as well as on the ship expired in twenty-four hours was not admissible (*o*).

Parol evidence.

Parol evidence may be resorted to for the purpose of explaining words which, being technical or local, have acquired a peculiar meaning; as, for instance, words relating to the articles of commerce which form the cargo (*p*), or the port (*q*), sea (*r*), or country to which the ship is bound (*s*).

Effect of superadded written words.

If, as is usually the case, part of the policy is printed and part written, it has been held that the words superadded in writing are entitled to have a greater weight attributed to them than the printed words; inasmuch as the written words are considered as more immediately the language of the parties (*t*).

(*m*) *Gabay v. Lloyd*, 3 B. & C. 793; *Bartlett v. Pentland*, 10 B. & C. 760; *Scott v. Irving*, 1 B. & Ad. 605; *Stewart v. Aberdeen*, 4 M. & W. 211; *Mackintosh v. Marshall*, 11 M. & W. 116; *Partridge v. Bank of England*, 9 Q. B. 396; the judgment of Parke, B., in *Bayliffe v. Butterworth*, 1 Ex. 428; and *Sweeting v. Pearce*, 7 C. B., N. S. 449; *S. C.*, in Cam. Scaoc., 9 C. B., N. S. 534.

(*n*) *Blackett v. The Royal Exchange Assurance Company*, 2 C. & J. 244; *Crofts v. Marshall*, 7 C. & P. 597; see also *Hall v. Janson*, 4 E. & B. 500; *Ross v. Thwaite, Backhouse v. Ripley*, cited in *Parkinson on Insurance*.

(*o*) *Parkinson v. Collier*, *Park on Insurance*.

(*p*) *Scott v. Bourdillon*, 2 N. R. 213; *Mason v. Skurray*, *Park on Ins.* 191.

(*q*) *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, *ib.* 405, note.

(*r*) *Brown v. Tayleur*, 4 A. & E. 241; *Uds v. Walters*, 3 Camp. 16.

(*s*) *Moxon v. Atkins*, 3 Camp. 200; *Robertson v. Clarke*, 1 Bing. 446; see also *Parr v. Anderson*, 6 East, 207; *Robertson v. Jackson*, 2 C. B. 412.

(*t*) See the judgment of Lord Ellenborough in *Robertson v. French*, 4 East, 136; also *Alaeger v. The St. Katharine Dock Company*, 14 M. & W. 794. See also *Gumm v. Tyrie*, 4 B. & S. 680; *S. C.*, Cam. Scaoc., 6 B. & S. 298; *Jessell v. Bath*; L. R., 2 Ex. 267, decisions on bills of lading. Where a policy is set out upon the record, and comes in this form before the Court, no argument can be rested on this distinction, unless it is averred on the record that the difference exists. See the judgment of Parke, B., in *Alaeger v. The St. Katharine Dock Company*, *ubi supra*.

The printed words are not, however, to be rejected unless they are inconsistent with those in writing. Where the policy contained the usual clause in print that the ship was insured until she had been at anchor twenty-four hours in safety, and a written clause protected her for thirty days' stay, it was held that the latter should be computed from the expiration of the twenty-four hours (u).

Thirdly, with respect to *open, and valued policies, and voyage, time, and mixed policies.*

A policy may be either *open* or *valued*. In the former, the value of the subject-matter of the insurance is not stated in the policy, and must be proved after a loss (x). In the latter, to prevent the necessity of proving the actual value in the event of a loss, a value agreed upon by the parties is mentioned in the policy, and is conclusive between them in case of loss (y).

OPEN, AND
VALUED POLI-
CIES.

(u) *Mercantile Marine Insurance Company v. Tetherington*, 5 B. & S. 765; 34 L. J., Q. B. 11; see *Lidgett v. Secretan*, L. R., 5 C. P. 190.

(x) Where, as it frequently happens, a shipowner is the proprietor of a line of vessels trading to and from particular ports, it is competent for him, in order that he may at no time be uninsured, to execute a series of running policies to attach as soon as each parcel of goods is shipped, and to succeed one another in order as the preceding ones become consumed. These policies are generally expressed to be "on goods by ship or ships as may be hereafter declared and valued." It is the duty of the assured to declare at the earliest opportunity to the underwriters the value of the shipments and the name of the vessel on which they are shipped. But the declaration is not a condition precedent, and if none is made the policy is then open instead of being valued. The shipments should be declared in the order of shipment. The assured is not allowed to declare some of the risks and remain his own insurer as to others. If by mistake, however, the shipment has been declared in a wrong order, the assured may correct the mistake even after loss. A declaration after loss has been held good where there was an absence of fraud, and the assured communicated with the underwriters at the earliest convenient opportunity. *Gledstanes v. The Corporation*

of the Royal Exchange Assurance, 5 B. & S. 797; 34 L. J., Q. B. 30; *Ionides v. The Pacific Insurance Company*, L. R., 6 Q. B. 674; *Stephens v. The Australasian Insurance Company*, L. R., 8 C. P. 18; *Imperial Marine Insurance Company v. The Fire Insurance Corporation, Limited*, 4 C. P. D. 166; *Harman v. Kingston*, 3 Camp. 150; *Robinson v. Touray*, *ib.* 158.

(y) See the judgment of Lord Ellenborough in *Forbes v. Aspinall*, 13 East, 326. In the absence of fraud this rule holds although the value stated in the policy may be largely in excess of the true value. *Barker v. Janson*, L. R., 3 C. P. 303; *Williams v. The North China Insurance Company*, 1 C. P. D. 757; *Lidgett v. Secretan*, L. R., 6 C. P. 616, 627. In the latter case it was held that a particular loss could not be deducted from the value stated in the policy. And where the loss is total and the agreed value has been paid by the underwriters, whatever remains of the vessel in the shape of salvage and all other rights accruing to the owner of the ship lost passes to the underwriters, as they have been held entitled to damages awarded by the Court of Admiralty to the owner of a ship lost by a collision. *The North of England Assurance Association v. Armstrong*, L. R., 5 Q. B. 244. Where, however, the assured is the owner of the lost ship and also of the ship which occasioned the damage, and has taken proceedings for the limitation of his liability under the M. S. Acts, the under-

A valued policy contains a clause to the following effect: "*The said ship, &c., goods and merchandize, &c., for so much as concerns the assureds, by agreement between the assureds and assurers in this policy, are and shall be valued at £ .*" If the amount of the valuation is not inserted in the policy, but is stated to be as thereafter may be declared, and no declaration is made before a loss, the policy is not void, but is treated as an open policy (z).

Amount recoverable in cases of total loss.

Where the policy is valued, the insured, notwithstanding the 19 Geo. 2, c. 37 (a), is entitled to recover the whole valuation, although it exceeds his interest (b). If, however, it appears that the valuation has been adopted as a mere cover to a wager (c), or that the value has been fraudulently misrepresented (d), the policy is void, and the insurer cannot recover even to the extent of his actual interest. Another effect of a policy being valued is that, in cases of constructive total loss, the assured may obtain in some events more than a compensation for his actual loss (e).

The general rule is, that where there are several insurances upon the same vessel, the valuation is conclusive only between the assured and the underwriters of that policy which contains the valuation. It is not enough for the underwriters on one of the other policies to show that the assured has received from another quarter the sum fixed by this valuation, unless this amounts to a real indemnity (f). Where, however, an owner effects two insurances, declaring the same value in each, he is bound by this sum, and cannot recover more on the two policies than the sum mentioned, although the real value of the vessel is more (g). And in a recent case it has been considered by the Court of Exchequer that where there are several valued

writers, although they have paid the agreed value, have no right to be reimbursed out of the fund brought into Court in the limitation of liability proceedings. *Simpson v. Thomson*, 3 App. Cases, 279.

(z) *Crauford v. Hunter*, 8 T. R. 15, note; *Harman v. Kingston*, 3 Camp. 150. Where a policy was on freight to "be valued at as under," and later in the policy were the words "on freight warranted free from capture," &c., and in the margin a little above was "1,300l.," it was held that this was not a valued policy. *Wilson v. Nelson*, 5 B. & S. 354.

(a) *Ante*, p. 441.

(b) *Lewis v. Rucker*, 2 Burr. 1167; *Shaw v. Felton*, 2 East, 114.

(c) See *per* Lord Mansfield in *Lewis v. Rucker*, 2 Burr. 1171.

(d) *Haigh v. de la Cour*, 3 Camp. 319.

(e) *Allen v. Sugrue*, 8 B. & C. 561; *Young v. Turing*, 2 M. & G. 593; *Manning v. Irving*, 1 C. B. 168; *S. C.* in error, 2 C. B. 784; 6 C. B. 391; 1 H. L. Cas. 287.

(f) *Bousfield v. Barnes*, 4 Camp. 228.

(g) *Irving v. Richardson*, 1 M. & Rob. 153.

policies on the same ship at different values, and the assured has, on a total loss, received under some of the policies part of the sums insured, he cannot, in an action upon another of the policies, recover more than the difference between the value mentioned in that policy and the sums he has actually received from the other insurers (*h*).

If the loss is only partial, the value in the policy must still be looked to as the basis of the calculation (*i*). This mode of valuation cannot, however, be applied to all cases of partial loss under policies which are, in form, valued. Thus, where a ship was to proceed to the coast of Africa on a barter voyage, and to bring back a cargo, and an insurance was effected covering both cargoes at a value named, and the ship was totally lost before she took in any homeward cargo, with two-thirds of the outward cargo on board, it was held that the valuation mentioned in the policy applied substantially to a full cargo, and entitled the assured to the value named, only in the event of the loss of a substantially full cargo, and to an indemnity, in case of any partial loss, not exceeding that sum; and as the value of the whole intended cargo was, under the circumstances, unknown, the Court was of opinion that the ordinary mode of estimating a partial loss under a valued policy could not be adopted, but that the claim must be dealt with as if it were a claim to an ordinary indemnity under an open policy underwritten for the sum mentioned as the value of the whole cargo (*k*).

Where loss partial.

An insurance may be effected either for a voyage, or for a number of voyages, in either of which cases the policy is called a *voyage* policy; or the insurance may be for a particular period, irrespective of the voyage or voyages upon which the vessel may be engaged during that period, and the policy is then called

VOYAGE,
TIME, AND
MIXED POLI-
CIES.

(*h*) *Bruce v. Jones*, 1 H. & C. 769. See, however, *Wilson v. Nelson*, 5 B. & S. 354.

(*i*) *Lewis v. Rucker*, 2 Burr. 1171; see also the judgment of Lord Ellenborough in *Forbes v. Aspinall*, 13 East, 327; and in *Bousfield v. Barnes*, *ubi supra*; also *Rickman v. Carstairs*, 5 B. & Ad. 651; and *Lobare v. Aitchison*, 4 App. Cases, 755. A contrary opinion obtained at one time, and it was argued that if the loss was only partial, the

value must be proved as in an open policy. This rule appears to have been founded upon a dictum of Lee, C. J., cited in *Shawe v. Tolton*, 2 East, 113, and is adopted in *Park on Ins.* 165. An able and elaborate refutation of this doctrine will be found in 1 *Arnould on Ins.* 357 (2nd edit).

(*k*) *Tobin v. Harford*, 13 C. B., N. S. 791; *S. C.*, Cam. Scacc., 17 C. B., N. S. 528; 34 L. J., C. P. 37.

a *time* policy (*l*). In other countries the length of the time for which a ship may be insured is not limited, but in England time policies made for a longer period than one year are, by statute, void *ab initio* (*m*).

In addition to the two last-mentioned kinds of policy there is a third, which is usually called a *mixed* policy; as, for instance, where a ship is insured "from A. to B. for a year." This is in effect a time policy with the voyage specified, and runs for the whole period insured, irrespectively of the completion or non-completion of the voyage (*n*). A policy of this description does not attach, unless the ship sails upon the voyage named (*o*); but although the insurance is limited to commence at a certain time, it is not necessary that the ship should be then in the port specified as the *terminus a quo* (*p*). Where a policy was effected on goods to the value of 12,000*l.*, in canal boats plying between London and Birmingham for twelve months, and the claim on the policy was warranted not to exceed a certain sum per cent., and it was stipulated that a given amount only was to be covered by the policy in any one boat, or any one trip, it was held that this was a continuing insurance, and applied to successive cargoes carried within the year, although goods exceeding 12,000*l.* in value had been carried (*q*).

RE-INSURANCE AND
DOUBLE IN-
SURANCE.

Fourthly, as to *re-insurance* and *double insurance*. Re-insurance is where an underwriter procures the sum which he has insured to be insured again to him by another underwriter. This is allowed in all cases by the law of France, and of the other maritime countries of Europe (*r*), and also in America (*s*). In this country, the right to re-insure was limited by 19 Geo. 2, c. 37, s. 4, to cases in which the insurer was insolvent, became bankrupt, or died. In the two former cases the underwriter

(*l*) In *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581; 1 Q. B. D. 96; 2 App. Cas. 284, it was held that a policy from 22nd January, 1872, to 23rd January, 1873, was a time policy, although the printed words "*at and from,*" and "*for this present voyage*" were left in the printed form.

(*m*) 30 Viot. c. 23, s. 8.

(*n*) As to mixed policies see *Gambles v. The Marine Insurance Company of Bombay*, 1 Q. B. D. 507.

(*o*) *Way v. Modigliani*, 2 T. R. 30.

(*p*) *Ib.*; see also *Martin v. Fishing Insurance Company*, 20 Pickering (American) Rep. 389, cited in Phillips on Ins., Chap. 11, s. 1.

(*q*) *Crowley v. Cohen*, 3 B. & Ad. 478. See further as to the construction of a policy covering the risks of river carriage, *Joyce v. Kennard*, L. R., 7 Q. B. 78.

(*r*) See 3 Kent Com. 279; Arnould on Ins. 340, note (*c*), (2nd edit.).

(*s*) Kent Com., *ubi supra*; Phillips on Ins., Chap. 3, s. 13.

himself, and in the latter his executors, might insure to the amount for which he insured, provided it was expressed in the policy to be a re-insurance (t). In 1864, by the 27 & 28 Vict. c. 56, s. 1, the prohibition contained in the 19 Geo. 2, c. 37, against re-insurance was removed; but it was still necessary to state in the policy that it was a re-insurance. Both these statutes are, however, now repealed by the 30 Vict. c. 23, and the 30 & 31 Vict. c. 59; and by the 4th section of the 30 Vict. c. 23, the expression sea insurance is defined to include re-insurance. Re-insurances are, therefore, now regulated by the same provisions as apply to other contracts of marine insurance (u).

Double insurance takes place when the same interest and the same risk is insured twice; a second insurance being often necessary where the precise value of the interest is not at first known. But if it appears, when the value of the interest becomes known, that there has been an over-insurance; that is to say, that the sum of the two or more insurances exceeds the interest of the assured, the excess cannot be recovered; for the insurance is, to this extent, an infringement of the rule against wagering policies. But although the assured is not entitled to be satisfied twice, yet he may proceed upon whichever of the policies he chooses, and may recover from one set of underwriters the whole sum insured, leaving the latter to sue the other underwriters for contribution (v). The extent to which the underwriters are liable to return the premium where there is an over-insurance will be mentioned at the conclusion of

(t) A mere parol transfer, however, of liability by one underwriter to another at a higher premium, in order to assign the intended benefit, was not prohibited by the statute, *Delver v. Barnes*, 1 Taunt. 48.

(u) The extent of the risk in cases of re-insurance is often governed by the terms of the original policy. See *Joyce v. The Realm Insurance Company*, L. R., 7 Q. B. 585. See also *Mackenzie v. Whitworth*, L. R., 10 Ex. 142; 1 Ex. D. 36, where the law relating to re-insurance is dealt with, and the earlier cases are referred to. It was held in that case that the fact that the risk was a re-insurance, was not in itself so material that its non-communication avoided the policy.

(v) *Newby v. Reed*, 1 W. Bl. 416. The ruling of Lord Mansfield in this

case is now always acted on in this country. 2 Park on Ins. 423; 1 Arnould on Ins. 346 (2nd ed.). A custom was, however, once proved to the contrary. See *The African Company v. Bull*, 1 Show. 132. The French rule is, that if the policies are made without fraud, and the first covers the whole value, it bears the whole loss, and the subsequent insurers are freed from liability on returning the premium, minus one-half per cent. Code de Comm., Art. 359. The convenience of some definite rule is so great, that in America the policy often contains a clause, providing that, if the assured shall have made any prior assurance, the subsequent assurers shall be answerable only for any deficiency not covered by it. See 3 Kent Com. 282; Phillips on Ins., Chap. 14, s. 3.

this Chapter. In these cases payment by one of the insurers operates as a satisfaction by both (*x*).

SUBJECT-MATTER OF INSURANCE.

Ship, &c. and goods.

Fifthly, as to *the subject-matter of insurance*. An insurance may be effected upon the ship or goods, or upon both; in the latter case the subject-matter is usually described by these words: "any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel, called the _____."

Profits.

An insurance may also be effected upon profits expected to accrue from the cargo, and in such cases it is sufficient to use the word "profits" generally, without further specifying what they may be (*y*). They may be insured either by a valued (*z*) or an open policy (*a*). The assured must, however, show that he has an insurable interest (*b*), which had attached at the time of the loss (*c*); and that but for the loss which intervened, profits would have been realized (*d*). Where a consignor had purchased rice and had resold it at a profit, and the vessel which was to carry it to the second vendee had been chartered, it was held that the consignor had an insurable interest in such profit, although a portion only of the rice had been shipped, and actually lost (*e*). As, however, the policy in this case limited the inception of the risk to "from and immediately following the loading" of the goods, it was held that the insurance applied only to profits arising from the rice actually put on board; and further, that even if the policy did attach to the profits of that portion of the rice which was left on shore, it only covered losses occasioned directly by perils of the sea, and not such as arose from the insurer being prevented, in consequence of the retardation of the voyage, from completing his contract of

(*x*) *Morgan v. Price*, 4 Ex. 615.

(*y*) *Eyre v. Glover*, 3 Camp. 276; 16 East, 218. Such an insurance is within the operation of the 19 Geo. 2, c. 37; see *Smith v. Reynolds*, 1 H. & N. 221.

(*z*) *Grant v. Parkinson*, Park. on Ins. 402; *Henricksen v. Margetson*, 2 East, 549, note; *Barclay v. Cousins*, ib. 544. See the judgment of Lawrence, J., in this case as to the foreign law on this subject.

(*a*) *Eyre v. Glover*, 2 Camp. 276.

(*b*) *Stockdale v. Dunlop*, 6 M. & W. 224; and *ante*, p. 441.

(*c*) *Knox v. Wood*, 1 Camp. 543.

(*d*) *Hodgson v. Glover*, 6 East, 316. In the American Courts proof that profits would have arisen on the voyage, is not required if the cargo has been lost. *The Patapsco Insurance Company v. Coultas*, 3 Peters (Amer.) Rep. 222.

(*e*) *M'Swiny v. The Royal Exchange Assurance Company*, 14 Q. B. 634.

resale (*f*). Where profits were insured by a policy on goods "beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship," and the ship was lost before she reached the port at which the cargo was ready to be shipped, it was held that the policy never attached, and that the owner of the cargo could not recover under it for the delay in the shipment of the cargo and consequent loss of profits (*g*).

Profits likely to arise upon the success of an adventure may be insured, such as shares in a telegraph company (*h*).

Freight, or the profit earned by the shipowner in the carriage of goods on board his ship (*i*), whether arising from a charter-party or the earnings of a general ship, may be insured either for the whole or a portion of the voyage (*k*); and this may be done by a time policy, though the freight is not to be earned till after the time expires. It must, however, be insured eo nomine, and is not covered by a policy on goods (*l*). Where an owner carries his own goods in his ship, the interest, which he has by reason of his saving the amount he would have been obliged to pay for their carriage had not the ship been his own, is covered by a policy on freight (*m*).

Freight paid before or during the voyage may also be insured as freight advanced or money advanced on account of freight (*n*). Advanced freight.

(*f*) *The Royal Exchange Assurance Company v. M'Swiny*, in Cam. Scacc., 14 Q. B. 646, overruling on this point the judgment of the Court below. See also *Chope v. Reynolds*, 5 C. B., N. S. 642, in which case the goods arrived without damage, but by a vessel into which they had been transhipped.

(*g*) *Halhead v. Young*, 6 E. & B. 312.

(*h*) *Wilson v. Jones*, L. R., 2 Ex. 139.

(*i*) See per Lord Ellenborough in *Forbes v. Aspinall*, 13 East, 325, and ante, p. 382.

(*k*) Where a charter involves more than one voyage, freight to be earned in a future voyage may be insured against perils to be incurred in the current voyage. Ex. gr., 4,000% on homeward freight against perils on the outward voyage. *Potter v. Rankin*, L. R., 3 C. P. 562; 5 C. P. 341; L. R., 6 H. L. 83. So also a portion of the entire freight may be insured so as to cover a loss which

may fall on the shipowner by reason of a special charter. *Griffiths v. Bramley Moors*, 4 Q. B. D. 70.

(*l*) *Michael v. Gillespy*, 2 C. B., N. S. 627; *Lucena v. Craufurd*, 2 N. R. 315. For instances of insurances on passage money subject to the provisions of the Passengers Act, 1852, see *Gibson v. Bradford*, 4 E. & B. 586; and *Willis v. Cooke*, 6 E. & B. 641. Passage money of passengers is not covered by an insurance on freight unless there be an express stipulation to that effect. *Denson v. The Home and Colonial Assurance Company*, L. R., 7 C. P. 341.

(*m*) *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. Janson*, 5 B. & C. 519.

(*n*) *Ellis v. Lafone*, 8 Ex. 546; *Hall v. Janson*, 4 E. & B. 500. See also as to disbursements advanced by charterer out of freight, *Currie v. The Bombay Native Insurance Company*, L. R., 3 P. C. 72; *Williams v. The North China Insurance Company*, 1 C. P. D. 757. See also post, p. 465.

So the interest of persons who have disbursed money for the use of the ship abroad, and taken in respect of their advances a bill of the captain's drawn against freight, may be insured as an advance on account of freight (o).

Inception of risk on freight.

In accordance with the rule already mentioned (p), the assured, in order to recover upon the policy, must show that at the time of the loss he had an insurable interest in the freight. Where the freight arises from the transportation of goods, the policy does not usually attach until the goods are actually shipped (q), or at least until part of the goods are on board, and the residue is ready to be shipped (r); nor unless a binding contract has been entered into for the loading of the goods (s), and the vessel was in a condition to receive them (t). If the ship have part only of her cargo on board at the time of the loss, the owner can recover in respect of that part, even although the insurance be by a valued policy (u).

Where the owner of a ship bought a cargo which was seven miles from the port in which the ship was, but ready to be sent on board, and the ship, after being ready to receive the cargo, was lost in an endeavour to get out of dock, it was held that a policy on freight attached (x). There is in practice, although not in principle, a material distinction on this head between the freight which accrues under a charter-party and that which may be earned independently of a charter. In the former case the policy attaches as soon as the ship has sailed under the charter-party, for thereupon an inchoate right to freight arises, although no portion of the cargo may have been taken on board (y). And where an owner having contracted to carry passengers, and to make alterations in the ship for their convenience, had shipped water for them, and commenced the alterations, it was held that this was an inception of the risk (z).

Where a shipowner insured the freight of a ship chartered

(o) *Wilson v. Martin*, 11 Ex. 684.

(p) *Ante*, p. 441.

(q) *Tonge v. Watts*, 2 Str. 1251.

(r) *Montgomery v. Eggington*, 3 T. R. 362; *Parke v. Hibson*, cited 2 B. & B. 326; *Jones v. The Neptune Marine Insurance Company*, L. R., 7 Q. B. 702. See also *Joyce v. The Realm Insurance Company*, L. R., 7 Q. B. 580.

(s) *Forbes v. Aspinall*, 13 East, 323; *Flint v. Flemyng*, 1 B. & Ad. 45; *Patrick v. Eames*, 3 Camp. 441.

(t) *Williamson v. Innes*, 8 Bing. 81, note; S. C., 1 M. & Rob. 88; *Devaux v. Janson*, 6 B. N. C. 519.

(u) *Forbes v. Aspinall*, *ubi supra*.

(x) *Devaux v. Janson*, *ubi supra*.

(y) *Thompson v. Taylor*, 6 T. R. 478; *Atty v. Lindo*, 1 N. R. 236; *Horncastle v. Stuart*, 7 East, 400; *Davidson v. Willassy*, 1 M. & S. 313; *Barber v. Fleming*, L. R., 6 Q. B. 59; *Foley v. The United Fire Insurance Company*, L. R., 5 C. P. 155.

(z) *Truscott v. Christie*, 2 B. & B. 320.

It depends on the terms of the policy & may be affected by terms of original policy or by the fact that the cargo has been shipped in continuation of other policy to the place where the policy was made or was to begin.

by the loss.

under a charter-party, which it was agreed was to be cancelled in the event of prohibition preventing loading, and the ship sailed on the voyage, but, before her arrival at the first of the loading ports mentioned in the charter-party, the ports of loading were closed by a foreign Government, it was held that the charter-party had been put an end to, and that the shipowner was entitled to recover against the underwriters (a).

Where a policy is on freight advanced in respect of the whole voyage described in the policy, and a portion of the freight is advanced after part of the voyage has been performed, this sum may be recovered against the underwriters, although it was paid before the policy was effected; since, in this case, the whole of the freight must be considered to have been at risk at the time of the loss (*b*).

Money advanced by the captain during the voyage for the use of the ship (*c*), and "commissions and privileges" payable to him (*d*) or to the consignee (*e*) may be insured. In the two latter cases it must be shown, as in the case of insurance on freight, that the interest of the insurer has attached in respect of the goods out of which the profits are expected (*f*).

The lender of money on bottomry, or *respondentia*, may also insure to the extent of his interest, but the policy must be expressed to be on bottomry, for such an interest is not covered by an insurance on the ship or goods (g). The borrower on bottomry can only insure upon the value of the ship or cargo, *minus* the amount which has been advanced; for it is obvious that without this deduction the insurance would exceed the amount of his interest in the subject-matter insured (h).

Loans on
bottomry.

The interests which have been already mentioned are those which in practice most frequently form the subject-matter of insurances; any interest, however, in the safety of a thing, or any liability which may be incurred is sufficient to create the

(a) *Adamson v. The Newcastle Steam Freight Insurance Association*, 4 Q. B. D. 404.

(b) *Ellis v. Lafone*, 8 Ex. 546. Loss of freight by reason of sea damage is insurable. *Griffiths v. Bramley Moore*, 4 Q. B. D. 70.

(c) *Gregory v. Christie*, 1 Park on
Ins. 14.

(d) *King v. Glover*, 2 N. R. 206.

M.P.

(e) *Flint v. Le Mesurier*, 2 Park on Ins. 403.

(f) *Knox v. Wood*, 2 Park on Ins. 405.

(g) *Glover v. Black*, 3 Burr. 1394.

(h) As to insurances effected by lenders on bottomry, see also *Thompson v. The Royal Exchange Insurance Company*, 1 M. & S. 30; *Broomfield v. The Southern Insurance Co. Limited*, L. R., 5 Ex. 192.

right to insure. Thus, it has been held that the owners of a vessel, who were answerable for any loss occurring by the negligence of their crew in bringing the cargo on board, might insure the goods against this risk (*h*). So the owners may insure against their liability for any damage which the ship insured may, by running down or otherwise, do to any other vessel (*i*), as well as for passage or compensation monies for which they are made liable by the Passengers Acts of 1855 and 1863 (*k*). In a recent case, the owner of a vessel, which, together with her cargo, had been deserted by the crew, and brought into port by salvors, having obtained possession of her, put in bail in the Court of Admiralty in a suit brought by the salvors; the ship afterwards sailed again, and together with the cargo was totally lost, and the owner of the ship was obliged to pay the amount of the salvage; it was held that he had an insurable interest in the average contribution due to him from the owners of the cargo on account of the salvage, and that he was entitled to recover this amount under a policy effected before the loss for the purpose of covering what he might have to pay under the bail bond (*l*).

The Merchant Shipping Act, 1862, limits, as we have seen (*m*), the liability of the owners of ships, whether British or foreign, in cases of loss of life or personal injury, and of damage to ships and goods which occur without their actual fault or privity; and it is expressly provided by that act that insurances effected against any of these events, occurring without the owner's fault or privity, shall not be invalid by reason of the nature of the risk (*n*).

Seamen's
wages.

The law of England, as of most other countries, forbids, on grounds of public policy, the insurance of seamen's wages, or of any equivalent which they may be entitled to receive in their stead (*o*). This rule does not, however, apply to the wages of

(*h*) *Walker v. Maitland*, 5 B. & A. 171.

(*i*) *Thompson v. Reynolds*, 7 E. & B. 172. See *supra*, p. 446.

(*k*) 18 & 19 Vict. c. 119, s. 55 (Appendix, p. cxcviii.); 26 & 27 Vict. c. 51, s. 18 (Appendix, p. cxlvii.); and *Gibson v. Bradford*, 4 E. & B. 586; *Willis v. Cooke*, 5 E. & B. 641, which were decided on very similar sections

in the 15 & 16 Vict. c. 44.

(*l*) *Briggs v. The Merchant Traders' Association*, 13 Q. B. 167.

(*m*) See *ante*, p. 80.

(*n*) M. S. Act 1862, ss. 54, 55. See *ante*, p. 442.

(*o*) *Webster v. De Tastet*, 7 T. R. 167; *Park. on Ins.* 14; see the judgment of Sir John Nicholl in *The Lady Durham*, 3 Hagg. 201.

the master, or to the commission to which he is entitled, or to any share which he may have as part owner (*p*).

We have already seen that the attempt to enter a blockaded ^{Blockade.} port is not an illegal act by the municipal law of England. It follows as a consequence that insurances effected in this country, either on ships to be employed, to the knowledge of the underwriters, in running a blockade, or on their cargoes, or on the profits expected to be derived from such an adventure, are not void (*q*).

All insurances are invalid which are intended to cover adventures, which are in violation of the statutory provisions as to convoy, neutrality, trade, or revenue of the country in which the insurance is effected (*r*). ^{Illegal trading.}

Thus, a policy effected in England upon a voyage which is contrary to the navigation laws, or in breach of the customs laws of this country, is void (*s*). So also would be an insurance prohibited by the articles of a treaty to which the sovereign of this country is a party (*t*). It is not necessary to mention more fully the cases depending upon the system established by the Navigation Acts, which are now repealed (*u*). With respect to contracts in violation of the customs laws, it has been held that if a small portion only of the goods insured be contraband the whole policy is vitiated, and the assured is precluded from recovering any part of his loss (*x*). And it is a general rule,

(*p*) *King v. Glover*, 2 N. R. 206; see *ante*, p. 466.

(*q*) *Ante*, p. 332.

(*r*) *Wainhouse v. Cowie*, 4 Taunt. 178; *Darby v. Newton*, 6 Taunt. 544; *Johnston v. Swinton*, Doug. 384. In cases of violation of statutory provisions as to convoy, it must be shown, if the policy was effected by an agent, that the assured authorized the infringement of the statute. *Carstairs v. Allnutt*, 3 Camp. 497; *Metcalf v. Parry*, 4 Camp. 126; *Thornhill v. Lance*, *ib.* 231.

(*s*) See *Morck v. Abel*, 3 B. & P. 35; *Chalmers v. Bell*, *ib.* 604; *Lubbock v. Potts*, 7 East, 449; *Gray v. Lloyd*, 4 Taunt. 136; *Campbell v. Innes*, 4 B. & A. 426; *Thompson v. Irving*, 7 M. & W. 367; *Suart v. Powell*, 1 B. & Ad. 266. All these cases were decided upon statutes which are now repealed;

but the principles laid down in them may still be useful in determining what is such an illegal trading as to invalidate an insurance. In *Cumard v. Hyde*, 1 E. B. & E. 670, and *Wilson v. Rankin*, 6 B. & S. 208, it was held that the sailing of a ship from her port of loading, in contravention of customs laws, did not prevent the owner of the cargo, who was not aware of the irregularity, from recovering on a policy on the cargo and freight. See also *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581. Where the owner of the cargo is aware of the illegal act he cannot recover. *Cumard v. Hyde*, 2 E. & E. 1.

(*t*) See *The Kenrom*, 2 Rob. 1, and *Bird v. Appleton*, 8 T. R. 562.

(*u*) *Ante*, p. 27.

(*x*) *Parkin v. Dick*, 2 Camp. 221; *S. C.* 11 East, 502; *Camelot v. Butten*, 4 B. & A. 184. It has been held, how-

that if there is an illegality in any part of an entire risk, the whole is thereby vitiated (y).

Effect of
foreign
revenue laws.

It has been often doubted how far the legality of an insurance ought to be affected by the fact that it is designed to cover a voyage in contravention of the revenue laws of a foreign state; that is to say, of a country other than that in which the policy is underwritten. Upon this point the most eminent jurists have differed (z). In England it has long been settled, that although all subjects are bound by the revenue laws of their own country, they owe no duty to similar laws of another state; so that an insurance upon a smuggling voyage, prohibited only by the laws of the country to which the ship may be trading, is valid, provided the object of the voyage is known to the underwriter (a). A similar doctrine has also prevailed in America (b).

Contraband
of war.

It has been already mentioned, in treating of the national character of the assured, that insurances effected in a belligerent country upon the property of an enemy are void (c). Insurances by neutrals, in a neutral country, upon goods which are the property of subjects of a belligerent state, or upon contraband of war (that is to say, stores or provisions which are destined for one of the belligerent powers) (d), have also been considered by some authorities to be void, as contrary to the law of nations (e). It has, however, been decided, both in this country

ever, that when a licence to carry prohibited goods has been obtained, and more are loaded than are covered by the licence, the insurance is valid in respect of the goods covered by the licence. See *Keir v. Andrade*, 6 Taunt. 498; *Butler v. Allnutt*, 1 Stark. 222; see also *Pieschell v. Allnutt*, 4 Taunt. 792.

(y) *Wilson v. Marryat*, 8 T. R. 31; *Bird v. Appleton*, *ib.* 582; *Lubbock v. Potts*, 7 East, 449; *Bird v. Pigou*, 2 Selw. N. P. 1006; *Cunard v. Hyde*, 2 E. & E. 1.

(z) Pothier, Kent, Story, and Marshall maintain that such insurances are illegal, on the principle that those who engage in foreign commerce are bound by the law of nations to act in obedience to the rules of the country in which they transact business. On the other hand, Valin, Emerigon, and Pardessus, uphold the legality of these contracts, upon the ground that they are sanctioned by usage, and Mr.

Arnould has, in his valuable Treatise on Insurance Law, adopted this view. See 1 Arnould on Ins. 744 (2nd edit.).

(a) *Planché v. Fletcher*, 1 Doug. 251; *Lever v. Fletcher*, 1 Park on Ins. 360. In the former of these cases such an insurance was held valid, although fictitious papers were used to carry out the purpose of the scheme.

(b) 3 Kent Com. 266.

(c) *Ante*, p. 440.

(d) See *The Endraught*, 1 Rob. 21, and the judgment of Sir W. Scott in *The Sarah Christina*, *ib.* 241; see also *The Twes Juffrowen*, 4 Rob. 242; *The Charlotte*, 5 Rob. 275; *The Richmond*, *ib.* 325; and *ante*, p. 376, note (y).

(e) Phillips on Ins. c. 3, s. 2, and the authorities there cited. As to where a policy contains a warranty against contraband of war, see *Seymour v. The London and Provincial Marine Insurance Company*, 41 L. J., C. P. 193; 42 L. J., C. P. 111.

and in America, that the carrying of enemies' goods, not being contraband of war, by a neutral ship is a lawful act, and, consequently, these adventures may be insured (*f*). And goods contraband of war being carried in a neutral ship from one neutral port to another are not liable to seizure by a belligerent, and, consequently, are insurable, except in those cases where the provisions of some municipal statute, such as in this country the Foreign Enlistment Act, 1870, have been infringed (*g*). The carrying of simulated papers in such a case, though evidence from which a cause of forfeiture may be incurred, is not in itself a breach of neutrality (*h*). Although the neutral is not liable to punishment in his own country for contraband trading, the goods he carries may, if on a voyage to an enemy's port (*i*), be seized by the opposite belligerent power, and in ordinary cases the whole cargo is forfeited to the captors, if any portion of it consists of contraband of war; it is therefore necessary, in order to render these insurances valid, that the nature of the trade and of the goods should be disclosed to the underwriter.

Sixthly, as to the voyage, and the effects of delay and deviation. THE VOYAGE.

It has been said that if the port to which the vessel is to sail is not named, the policy will be void for uncertainty (*k*); but however this may be, the voyage should be accurately described; since the inception and termination of the risk is usually limited by this part of the policy (*l*).

If the insurance is merely "from" a port, the policy does not attach until the vessel actually sails (*m*); if it is "at and from" Description of, in policy. Commencement of risk, how described.

(*f*) *Barker v. Blakes*, 9 East, 283; see also *Richardson v. Maine Insurance Company*, 6 Mass. (American) Rep. 114, 115, cited 3 Kent Com. 268, and *supra*, p. 332, note (*u*).

(*g*) *Hobbs v. Hemming*, 17 C. B., N. S. 791; 34 L. J., C. P. 117. See 33 & 34 Vict. c. 90 (Suppl. Appendix, p. 152).

(*h*) *Id.*

(*i*) See the judgment of Sir W. Scott in *The Charlotte*, 5 Rob. 277.

(*k*) *Molloy*, B. 2, c. 7, s. 14.

(*l*) *Robertson v. French*, 4 East, 130; *Langhorn v. Hardy*, 4 Taunt. 628;

Uhde v. Walters, 3 Camp. 16.

(*m*) As to what amount to "sailing," or to "commencement of voyage," see *Roclandts v. Harrison*, 9 Ex. 444; *Thompson v. Gillespie*, 5 E. & B. 209, and *Hudson v. Bilton*, 6 E. & B. 565; see also *Jones v. The Neptune Marine Insurance Company*, L. R., 7 Q. B. 702, where the policy was in this form, on freight "beginning from the loading of the vessel," and part only of the goods being on board when she was lost, the policy was held not to have attached.

the port, she is protected from the time of her arrival (*n*) and during her continuance there (*o*).

The words "at and from" a particular island or coast, protect a vessel whilst she is going from port to port in such island or on such coast, for purposes connected with the voyage (*p*), as, for instance, for the purpose of discharging an outward cargo (*q*); of loading a homeward cargo; or of joining convoy (*r*). If, however, a vessel is insured to sail from a particular place, which is named in the policy, she will not be protected if she sail from a different place, although it be within the same port (*s*). Where a ship was insured "at and from her port of lading," and she began to load her cargo at one place, and then proceeded to another several miles distant in the same creek, but not on the direct route of her voyage, and these places were not shown to constitute one port, although they were within the district of the same custom house, it was held that this was not authorized by the terms of the policy (*t*).

The words "at and from" a port imply, either that the ship is at the port mentioned, or that she will be there so soon after the time mentioned as not materially to vary the risk (*u*). And it is immaterial whether her delay was occasioned by the default or misfortune of the assured (*x*). These words also imply that the ship will arrive in such a condition as to enable her to lie in reasonable security. It is not necessary that she should arrive in such a state as to be then seaworthy for the voyage, but she must have been once at the place in good safety. If, therefore, she

(*n*) *Haughton v. The Empire Marine Insurance Company*, L. R., 1 Ex. 206. It was held in that case that the policy attached, though the vessel was not safely moored, and that it was to be construed irrespective of the terms of the outward policy. See also *Foley v. The United Kingdom Fire Insurance Company*, L. R., 5 C. P. 155.

(*o*) *Motteux v. The London Assurance Company*, 1 Atk. 545; *Rotch v. Edie*, 6 T. R. 413; *Palmer v. Marshall*, 8 Bing. 79; *Williamson v. Innes*, *id.* 81, note. See as to the meaning of the words "during her stay and trade there," *The Company of African Merchants v. The British and Foreign Marine Insurance Company*, L. R., 8 Ex. 154.

(*p*) See the judgment of Lord Mansfield in *Bond v. Nutt*, 2 Cowp. 606.

(*q*) *Warre v. Miller*, 4 B. & C. 538.

(*r*) *Cruikshank v. Janson*, 2 Taunt. 301; see also the judgment of Park, J., in *Forshaw v. Chabert*, 3 B. & B. 165.

(*s*) *Constable v. Noble*, 2 Taunt. 403. Even although the name of the place is the same as that of the port within the bounds of which it is included. *Id.*; see also *Payne v. Hutchinson*, *id.* 405, note.

(*t*) *Brown v. Tayleur*, 4 A. & E. 241. As to what constitutes a "port" within the meaning of a policy, see *Harrouer v. Hutchinson*, L. R., 4 Q. B. 523, and 5 Q. B. 584, and the cases there cited.

(*u*) *Hull v. Cooper*, 14 East, 479; see also *Mount v. Larkins*, 8 Bing. 108; *Motteux v. The London Assurance Company*, 1 Atk. 548; *Haughton v. The Empire Marine Insurance Company*, L. R., 1 Ex. 206.

(*x*) *De Wolf v. The Archangel Mar. Bank*, L. R., 9 Q. B. 451.

arrives at the outward port so shattered as to be a mere wreck, the policy never attaches (*y*). This undertaking applies, however, only to the physical condition of the vessel; therefore, where a ship, on her arrival in safety at the port "at and from" which she was insured, was seized and condemned by a foreign government on account of political causes, it was held that the policy had attached (*z*).

In policies upon goods it is usual to name the period at which the risk is to attach. Where it is stated to be "from the loading thereof" at a particular place, goods which have been previously put on board at another port, as a portion of the outward cargo, are not protected (*a*). But where goods laden at one port are discharged and re-laden at another in order to allow the vessel to refit, they are covered by a policy which describes the latter port as the port of loading in the voyage, as "at and from" that port (*b*). If the place of loading is not named, it will be intended to be a loading at the place where the voyage is to commence (*c*). This strict construction has, however, been relaxed where there is anything on the face of the policy to show that the intention was to cover goods previously on board, as where the policy was declared to be "in continuation of others," which others included a voyage to the port of lading (*d*). And the same construction was put on a policy which expressed that the insurance was to commence from the loading, "wheresoever," &c. (*e*).

In policies on goods.

Having considered the cases which relate to the commencement of the voyage, or the *terminus a quo*, we will now mention those which relate to its conclusion, or *terminus ad quem*; leaving the decisions as to the intermediate passage to be considered under the head of *deviation*.

Termination of risk, how described.

If the voyage be described as to a country generally, it terminates upon the arrival of the ship at any port in that country. And if as to a named port, it continues until the mooring of the vessel in that port in the usual place of discharge

(*y*) See the judgment of Lord Ellenborough in *Parmeter v. Cousins*, 2 Camp. 235.

(*z*) *Bell v. Bell*, 2 Camp. 475.

(*a*) *Robertson v. French*, and *Langhorn v. Hardy*, 4 Taunt. 268; *Horney v. Lushington*, 15 East, 46; *Mellish v. Allnut*, 2 M. & S. 106; *Rickman v. Carstairs*, 5 B. & Ad. 661. See also *Jones v. The Neptune Marine Insurance*

Company, L. R., 7 Q. B. 702.

(*b*) *Nonnen v. Kettlewell*, 16 East, 176, and *Carr v. Montefiore*, 5 B. & S. 408; 33 L. J., Q. B. 256.

(*c*) *Spitta v. Woodman*, 2 Taunt. 416.

(*d*) *Bell v. Hobson*, 16 East, 240; *Joyce v. The Realm Insurance Company*, L. R., 7 Q. B. 580.

(*e*) *Gladstone v. Clay*, 1 M. & S. 418.

for the cargo on board (*f*). If it be stated to be to a port or ports in a particular district, the voyage continues until the vessel arrives at her last port of discharge in that district. If, however, her unloading at this port is rendered impracticable, as by an embargo or the like, the policy will be exhausted when the ship has put into the last port in the district named which she can make with safety (*g*). Where a ship was insured "at and from St. Vincent, Barbadoes, and all or any of the West Indian Islands, to her port or ports of discharge and loading in the United Kingdom, during her stay there and thence back to Barbadoes, and all or any of the West Indian colonies, until the ship should have arrived at her final port as aforesaid," it was held that the adventure terminated at the place in the West Indian colonies where she substantially discharged her cargo from this country (*h*).

Until at anchor twenty-four hours in good safety.

In order to prevent questions arising as to the duration of insurances after the arrival of the ship at her port of discharge, a provision is not unfrequently inserted that the insurer's liability shall continue until the ship is at anchor twenty-four hours in good safety. Under these words a ship is protected if arrested on her arrival in the port, or ordered back to perform quarantine (*i*). It has been said, that if a ship insured upon these terms to any particular port of delivery is forced by stress of weather into a different port, and there discharges part of her cargo, and afterwards proceeds to her port of delivery, the policy remains good; but that where the policy is general to a particular country, and the vessel comes to a port, and there voluntarily remains and discharges part of her cargo, the policy, whether on ship or goods, expires after she has remained there twenty-four hours (*k*). Even where the policy includes the above provision, doubts may arise as to whether the place at which the vessel is moored can be considered as her destination. This question may be affected by the state of the tide, the general usage of the port, or even by the intention of the master. Thus, where a vessel insured to London, by a

(*f*) *Camden v. Cowley*, 1 W. Bl. 417; *Stone v. The Marine Insurance Company, Ocean Limited, of Gothenburg*, 1 Ex. D. 81.

(*g*) *Brown v. Vigne*, 12 East, 283; but see *Oliverson v. Brightman*, 8 Q. B. 783.

(*h*) *Moore v. Taylor*, 1 A. & E. 26.

(*i*) *Waples v. Eames*, 2 Str. 1243; *Minett v. Anderson*, Peake, 211; *Horney v. Lushington*, 15 East, 46.

(*k*) See the ruling of Lord Kenyon in *Leigh v. Mather*, 1 Esp. 412.

policy containing these terms, was moored for several days in the Thames, outside one of the docks into which the captain intended to take her, but he was prevented from so doing by ice in the river, it was held that the underwriters were liable for an injury which occurred to her whilst she was moving towards the dock; since, although she had been anchored more than twenty-four hours, it was not at her place of destination (l). In a more recent case, however, a vessel similarly insured, from Liverpool to Quebec and back to her discharging port in the United Kingdom, was chartered from Quebec with a cargo of timber to be discharged in Wallasey Pool, in the river Mersey. She arrived in the Mersey, and on the following day was towed up to the entrance of Wallasey Pool, but being unable to enter, by reason of her drawing too much water, the captain anchored, and after reporting the vessel, discharged the deck cargo, and a considerable portion of the other cargo, which proceedings occupied several days. The ship then fell over, and sustained damage. The captain always intended to take her into Wallasey Pool with as much cargo on board as she could carry with safety. Upon these facts it was held that the underwriters were not liable, as the vessel had arrived as near to Wallasey Pool as she could safely get, had begun to discharge her cargo, and had been moored in safety twenty-four hours after her arrival at her port of discharge (m).

In all these cases the question is one of fact, depending upon the custom and usage of the port and the nature of the voyage (n).

When a policy insures a ship against loss for a certain period after her arrival at her port of discharge, and there is also a clause protecting her for twenty-four hours at anchor, the time so covered after her arrival is to be reckoned from the expiration of the twenty-four hours (o).

Where the insurance is on goods, the policy usually provides In policies on goods.

(l) *Samuel v. The Royal Exchange Assurance Company*, 8 B. & C. 119; *Stone v. The Marine Insurance Company, Ocean Limited, of Gothenburg*, 1 Ex. D. 81.

(m) *Whitwell v. Harrison*, 2 Ex. 127.

(n) *Lindsay v. Janson*, 4 H. & N. 699. See also *Parker v. Winlow*, 7 E. & B. 942; *Wingate v. Foster*, 3 Q. B. D. 582.

(o) *Mercantile Marine Insurance Company v. Titherington*, 5 B. & S. 765. See also *Gambles v. The Ocean Marine Insurance Company of Bombay*, L. R., 1 Ex. D. 141. In that case the words "for fifteen days whilst there after arrival" were held to cover a period within that time, although the cargo was discharged. As to what constitutes "safety," see *Lidgett v. Secretan*, L. R., 5 C. P. 190.

that they shall be protected until they are "discharged and safely landed," or contains the words "including all risk to and from the ship." The goods are, in this case, protected even whilst in public lighters, if this is the usual mode of landing them (*p*); unless the consignee by some act of his own, as by undertaking the charge of landing them himself, discharges the insurer (*q*).

Delay and
its effects.

It is of the essence of an insurance upon a voyage that there should be no unreasonable delay in its commencement; and if it occurs without a sufficient cause, the underwriter is discharged. When no time is fixed, the assured impliedly undertakes that the vessel will sail within a reasonably short time (*r*). What is a reasonable time must be determined by the existing state of things at the port where the ship may be. It has been held that the fact that the vessel insured was a yacht, a kind of vessel which does not usually go to sea during the winter, formed no excuse for a delay in sailing which continued from January to May (*s*).

When ex-
cused.

But a delay during the voyage, which arises from causes over which the assured have no control (*t*), or which is necessary for the purpose of repairing (*u*), or of procuring a sufficient crew (*v*), or of obtaining a cargo (*x*), or, indeed, for any other reasonable purpose, requisite for carrying out the object of the adventure, is allowable. A delay, however, for the purpose of avoiding a peril not insured against, although requisite for carrying out the adventure, would not be allowable (*y*). Excusable delays may also occur when it is necessary to lie by another ship after a collision. For not only is this an obvious

(*p*) *Hurry v. The Royal Exchange Assurance Company*, 2 B. & P. 430; 3 Esp. 289; *Rucker v. The London Assurance Company*, *ib.* 432, note; *Matthis v. Potts*, 3 B. & P. 23; 3 Esp. 290; *Lane v. Nixon*, L. R., 1 C. P. 412. In this case it was held that the implied warranty of seaworthiness does not extend to lighters by which the cargo is landed.

(*q*) *Strong v. Natally*, 1 N. R. 16; *Sparrow v. Carruthers*, 2 Str. 1236.

(*r*) *Palmer v. Marshall*, 8 Bing. 317; *Mount v. Larkins*, *ib.* 108; *De Wolf v. The Archangel Maritime Bank and Insurance Company*, L. R., 9 Q. B. 451.

(*s*) *Palmer v. Marshall*, *ubi supra*; *Palmer v. Fenning*, 9 Bing. 462. In these actions, which arose out of the same insurance, the Court observed, that the owner might have protected himself by insuring "in port and at sea."

(*t*) *Samuel v. The Royal Exchange Assurance Company*, 8 B. & C. 119; *Schroder v. Thompson*, 7 Taunt. 462.

(*u*) *Smith v. Surridge*, 4 Esp. 25.

(*v*) *Grant v. King*, *ib.* 175.

(*x*) *Phillips v. Irving*, 7 M. & G. 328. In this case the voyage was a seeking voyage.

(*y*) See the cases cited above, and *post*, p. 476.

duty (s), but it is expressly provided by sect. 16 of the Merchant Shipping Act, 1873, that in every case of collision it shall be the duty of the master or person in charge of each ship to stay by the other ship until he has ascertained that she has no need of further assistance, and to render to her, her master, crew and passengers, all the assistance that may be practicable and necessary, in order to save them from any danger caused by the collision. Where a provision is contained in the policy regulating the delay to be allowed, the underwriter is discharged if this time be exceeded. Thus, where a policy gave liberty "to wait two months at Monte Video if needful," it was held that the assured was restricted to two months; and that a delay beyond that time, although for a necessary cause, discharged the underwriter (a).

The underwriters are also discharged by an improper deviation from the usual course of the voyage. The objection to a deviation is, not that the risk is increased, but simply that one of the parties contracting has voluntarily substituted another voyage for that which has been insured (b). If liberty be reserved to call at one port, the assured may not call at another, although it is not more out of the usual course of the voyage; for every wilful deviation determines the policy, and it is immaterial from what cause, or at what place, the subsequent loss arises (c).

Deviation
and its effects.

Whether any particular alteration of the voyage is such a deviation as will discharge the underwriters is a question of fact which depends upon the description of the voyage in the policy, upon the ordinary and understood mode of performing it, and upon the terms of any warranty or representation which is capable of being attached to the contract (d). It may, however, be said generally, that any unnecessary departure from the

(a) See *The Celt*, 3 Hagg. 321; *The Despatch*, Swa. 140; *The St. Lawrence*, 14 Jur. 534; 7 No. Ca. 556; *The Catalina*, 2 Spks. 223.

(b) *Doyle v. Powell*, 4 B. & Ad. 267. See also *The Company of African Merchants v. The British and Foreign Marine Insurance Co.*, L. R., 8 Ex. 154.

(c) See the judgment of Lord Mansfield in *Lavabre v. Wilson*, 1 Doug. 291; *S. C.*, Park on Ins. 465.

(d) *Elliot v. Wilson*, 4 Brown, P. C. 470; *Clason v. Simmonds*, cited 6 T. R. 533; and the judgment of Cleasby, J., in *Harrover v. Hutchinson*, L. R., 5 Q. B. 584.

(e) See *Lindsay v. Janson*, 4 H. & N. 699, and the cases cited on the next page; also *Pearson v. The Commercial Union Assurance Company*, 15 C. B., N. S. 304, L. R., 8 C. P. 548; 1 App. Cas. 498; *Wingate v. Foster*, 3 Q. B. D. 582.

shortest, or most usual course, and any improper or unaccustomed stoppage at a port, is a deviation (*e*). If there are different courses by which the voyage insured may be accomplished, the underwriter is entitled to the benefit of the master's judgment as to which of them is most expedient; and if the master, by the instructions of the shipowner, pursue one of these courses, and the fact of these instructions is not communicated to the underwriter, the policy will be vitiated on the ground of the variation of the risk or of an improper concealment (*f*). Neither a mere intention to deviate (*g*), nor a variation of the original design of the voyage, as by taking on board additional goods, if neither delay nor increase of risk arises, and the course of the voyage is not affected, will avoid the insurance (*h*).

Questions analogous to those which we have been considering have arisen in time of war, as to the effect of carrying letters of marque. It was at one time held that the mere taking letters of marque on board, in opposition to the positive directions of the underwriters, vitiated the policy (*i*); but later cases show that this was not so, at all events where there was no intention of using the letters of marque (*k*). And in America it has been expressly held that the mere fact of the vessel taking letters of marque, without the leave of the underwriter, did not affect the policy (*l*). If, however, a vessel, in the use of letters of marque, went out of the proper course for the purpose of cruising, that clearly amounted to a deviation (*m*).

When excused.

As in the case of delay, so in that of deviation, if it arise from one of the perils insured against, or is necessary for the purposes of the voyage, or proceed from a cause over which the assured, or his agents have no control, the insurance is not affected by it. Thus, if the deviation is caused by stress of weather (*n*), by the barratry of the master (*o*), or by a refusal of the crew to proceed (*p*), or if the ship is carried out of her course by a

(*e*) See *Davis v. Garrett*, 6 Bing. 725.

(*f*) *Middlewood v. Blakes*, 7 T. R. 162.

(*g*) *Keuley v. Ryan*, 2 H. Bl. 343.

(*h*) *Raine v. Bell*, 9 East, 195; *Laroche v. Owain*, 12 East, 131, overruling *Stitt v. Wardell*, 2 Esp. 610, and *Sheriff v. Potts*, 5 Esp. 96; see also *Ashley v. Pratt*, 16 M. & W. 471; 1 Ex. 257.

(*i*) *Denison v. Modigliani*, 5 T. R. 580.

(*k*) *Moss v. Byrom*, 6 T. R. 379; see also the judgment of Lawrence, J., in

Raine v. Bell, 9 East, 201, and the observations of Lord Ellenborough in *Jarratt v. Ward*, 1 Camp. 263.

(*l*) *Wiggin v. Amory*, 13 Mass. (American) Rep. 118; *Wiggin v. Boardman*, 14 *ib.* 12.

(*m*) *Jolly v. Walker*, 2 Park on Ins. 448.

(*n*) *Harrington v. Halkeld*, 2 Park on Ins. 455.

(*o*) *Vallejo v. Wheeler*, 1 Cowp. 143.

(*p*) *Driscoll v. Bovil*, 1 B. & P. 313.

King's ship, the underwriter is still liable (*q*). To excuse the deviation, however, it must take place under compulsion, physical or moral. Where a merchant vessel put to sea after an enemy's ship, in accordance with the orders of a king's officer, but it did not appear that any compulsion or threat had been used, it was held that no sufficient excuse for a deviation had been established (*r*). A deviation is excused also if the master goes out of the way *ex justa causa*, as to refit, or to avoid enemies, or pirates (*s*), or the operation of an embargo (*t*), or for the purpose of joining convoy (*u*), or for any other cause which renders the deviation necessary for the safety of the ship, and which is not expressly excluded by the terms of the policy (*x*); unless, indeed, this cause is one of the perils not insured against (*y*). And if the ship is in a decayed or injured condition, she may put into the nearest port for the purposes of necessary repair (*z*).

In addition to the above justifiable causes of deviation, it seems that a vessel may depart from her course in order to save the lives of those on board a ship in distress (*a*).

A deviation is not justifiable if it be made to avoid a peril which is not insured against (*b*); nor will a deviation by reason of necessity be excused, if the immediate cause of the necessity is the negligence or want of caution of the owners (*c*). In cases of deviation by necessity, nothing more must be done than the

(*q*) *Scott v. Thompson*, 1 N. R. 181.

(*r*) *Phelps v. Auldjo*, 2 Camp. 350.

(*s*) *Per Lord Mansfield in Pelly v. The Royal Exchange Assurance Company*, 1 Burr. 350; *Driscoll v. Pasmore*, 1 B. & P. 200.

(*t*) *Blackenhagen v. The London Assurance Company*, 1 Camp. 454.

(*u*) *Gordon v. Morley*, 2 Str. 1265; *Bond v. Gonzales*, 2 Salk. 445; *Bond v. Nutt*, 2 Cowp. 601; *Warwick v. Scott*, 4 Camp. 62.

(*x*) See *per Gibbs, C. J.*, in *D'Aguiar v. Tobin*, Holt, 186.

(*y*) See *post*, p. 478.

(*z*) *Motteux v. The London Assurance Company*, 1 Atk. 545.

(*a*) See *Scaramanga v. Stamp*, 5 C. P. D. 295, *ante*, p. 312, where it was held that, as between the charterer and shipowner, the ship was not entitled to deviate for the purpose of saving property, no question of saving life being involved. The same principle would govern in favour of underwriters. See also the judgments of Lawrence,

J., in *Lawrence v. Sydebotham*, 6 East, 54, and of Sir C. Robinson in *The Jane*, 2 Hagg. 345. In America the same rule has been acted upon in some cases. See 3 Kent Com. 313; Phillips on Ins. c. 12, s. 1; 2 Pass. Mar. Law, bk. 2, c. 8, p. 298. *The Henry Ewbank*, 1 Sumner (American) Rep. 400; *The Schooner Boston*, *ib.* 328. In *The Trus Blue*, L. R., 1 P. C. 250, the Judicial Committee of the Privy Council, after reviewing the authorities, said that this question must be considered as still undecided, and as it came before the Court only incidentally, they declined to decide it. See also *The Scindia*, *ib.* 241. In modern policies a clause is sometimes inserted permitting the ship insured to "assist and tow vessels in all situations." *The Thetis*, L. R., 2 A. & E. 365.

(*b*) *O'Reilly v. The Royal Exchange Assurance Company*, 4 Camp. 246; *Forshaw v. Chabers*, 3 B. & B. 158.

(*c*) *Woolf v. Claggett*, 3 Esp. 257.

necessity requires (*d*). Therefore, where a ship endeavouring to avoid an embargo, had an opportunity of entering a neighbouring friendly port, but instead of availing herself of it, she sailed back to her port of outfit, the underwriters were held to be discharged (*e*). If a ship is driven by a storm into a port out of her voyage, she is not bound to return back to the point whence she was driven, if she does her best to proceed to her port of destination; and if no time is lost by so doing, she may take in cargo at the intermediate port (*f*).

Effect of
usage.

A deviation which would otherwise discharge the underwriters may also, in accordance with a principle already noticed (*g*), be justified by an usage or custom which is so notorious, that it must be presumed to have been known to the insurers when they underwrote the policy. Thus, in voyages to the East Indies and back, by vessels in the employment of the East India Company, an intermediate voyage made by order of the council in accordance with a practice then usual, was held to be no deviation (*h*). A liberty of a similar kind has also been recognized in respect of ships trading to Newfoundland (*i*).

Construction
of express
reservations
giving liberty
to deviate.

Express reservations in the policy, by which the vessel is permitted to depart from the ordinary course of the voyage, have usually been construed strictly as against the assured, and have been confined to such deviations as are consistent with the general objects and purposes of the voyage. Thus, where leave was given to carry letters of marque, and to chase, capture, and man prizes, it was held that this did not justify the ship in shortening sail and lying-to several times on the voyage, in order to allow a prize which she had captured to come up and keep company with her (*k*). Where permission is given to touch at different ports, the ship may omit some of them (*l*); but if she goes to more than one, she must visit them in the order described in the policy (*m*), unless it appear clearly from the whole scope of the adventure, or from the expressions used

(*d*) *Per* Lord Mansfield in *Lavabre v. Wilson*, 1 Doug. 291.

(*e*) *Blackenhagen v. The London Assurance Company*, 1 Camp. 454.

(*f*) *Delaney v. Stoddart*, 1 T. R. 22.

(*g*) See *ante*, pp. 455, 456, and *Bond v. Gonsales*, 2 Salk. 445.

(*h*) *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 1 Park on Ins. 83; *Farquharson v. Hunter*, *id.*

84; *Grant v. Paxton*, 1 Taunt. 463.

(*i*) *Vallance v. Dewar*, 1 Camp. 503.

(*k*) *Lawrence v. Sydebotham*, 6 East, 45; see also *Jarratt v. Ward*, 1 Camp. 263; *Hibbert v. Halliday*, 2 Taunt. 428.

(*l*) *Marsden v. Read*, 3 East, 572.

(*m*) *Marsden v. Read*, *ubi supra*; see also *Beatson v. Haworth*, 6 T. R. 531; *Gairdner v. Senhouse*, 3 Taunt. 16.

in the policy, that it was not intended to indicate the order in which the ship must proceed, but merely to describe the district comprehending all the ports and places which she might visit (*n*). This liberty to touch is also available only for purposes connected with, and subordinate to, the voyage insured. Calling at a port, therefore, for any other purpose, notwithstanding the policy may contain very general terms, as, for instance, that the ship may touch "for all purposes whatsoever," has been held to avoid the insurance (*o*). A liberty, however, to touch, or to touch and stay, will authorize the discharging or taking in of cargo, provided this is not inconsistent with the general purposes of the voyage, and does not increase or vary the risk (*p*).

If the vessel sails upon the voyage insured, and deviates during the course of it, the assured may recover for a loss which happens before she reaches the dividing point (*q*). Thus, where a policy was effected on goods from Liverpool to London, and the ship, without any permission to do so, put into Southampton to discharge a portion of the cargo, it was held that until she changed her course for Southampton the goods were protected by the policy (*r*).

It has been already said that a mere intention to deviate will not affect the policy (*s*). On the other hand, however, the policy is discharged if the master never intended to sail on the voyage insured, although the loss may occur before she arrives at the deviating point. Thus, where the insurance was on a voyage from Maryland to Cadiz, and the captain, when he sailed, had no intention of going to that place, it was held that the policy was discharged, although the vessel, when captured,

(*n*) *Metcalf v. Parry*, 4 Camp. 123; *Bragg v. Anderson*, 4 Taunt. 229; *Ashley v. Pratt*, 16 M. & W. 471; 1 Ex. 257.

(*o*) *Langhorn v. Allnutt*, 4 Taunt. 511; *Williams v. Shee*, 3 Camp. 469; *Hammond v. Reid*, 4 B. & A. 72; *Solly v. Whitmore*, 5 B. & A. 45; *Bottomley v. Bovill*, 5 B. & C. 210. The following are cases in which the staying or trading has been held authorized by the terms of the policy. *Urquhart v. Barnard*, 1 Taunt. 460; *Cormack v. Gladstone*, 11 East, 347; *Violet v. Allnutt*, 3 Taunt. 419; *Rucker v. Allnutt*, 15 East, 278; *Armet v. Innes*, 4 Moore, 150; *Leathly v. Hunter*, 7 Bing. 517;

Warre v. Miller, 4 B. & C. 539. See also the cases cited *ante*, p. 475. The words "stay and trade" mean "stay for the purpose of trade." See *The Company of African Merchants v. The British and Foreign Marine Insurance Company*, L. R., 8 Ex. 156.

(*p*) *Raine v. Bell*, 9 East, 195; *Cormack v. Gladstone*, *ubi supra*.

(*q*) *Green v. Young*, 2 Salk. 444; *Carter v. The Royal Exchange Assurance Company*, cited 2 Str. 1249; *Hessington v. Allnutt*, 1 M. & S. 46.

(*r*) *Hare v. Travis*, 7 B. & C. 14.

(*s*) *Thellusson v. Fergusson*, 1 Doug. 361; *Kewley v. Ryan*, 2 H. Bl. 343; see also *ante*, p. 476.

was in the course from Maryland to Cadiz, and had not reached the point at which she would have diverged to go to the place for which she was actually destined (*t*).

**PERILS IN-
SURED
AGAINST.**

Seventhly, as to *the perils insured against*. We have seen in what terms those perils are usually described in the policy (*u*). We will consider them in the order in which they are mentioned; observing, that in all inquiries as to whether a particular peril falls within the description in the policy, it is a leading principle that the *proximate* and not the *remote* cause is to be looked to (*v*).

**Perils of the
sea.**

The words "perils of the sea" apply only to losses of which the operative cause occurs while the ship is at sea, or in a place where the tide flows (*x*). They do not include an injury done whilst the vessel is hove down on a beach within the tide-way (*y*), or in a graving dock (*z*). Nor do they apply to all perils which may happen on the sea (*a*); but to such of these accidents only as are *caused by* the violence of the wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, or the like (*b*). Thus, meat rendered putrid by delay occasioned by tempestuous weather is not lost

(*t*) *Woolridge v. Boydell*, 1 Doug. 16; *Way v. Modigliani*, 2 T. R. 30.

(*u*) *Ante*, p. 445.

(*v*) *In jure non remota causa sed proxima spectatur*. Bacon's Max. I, where it is said, "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itselfe with the immediate cause, and judgeth of acts by that, without looking to any further degree." See *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Anderson v. Morice*, L. R., 10 C. P. 699; 1 App. Cas. 713; *Heyman v. Parish*, 2 Camp. 149; *Green v. Elmalie*, Peake, 278, 3rd edit.; *Hodgson v. Malcolm*, 2 N. R. 336; *Sadler v. Dixon*, 8 M. & N. 895; *Naylor v. Palmer*, 8 Ex. 739; 10 Ex. 382; *Thompson v. Hopper*, 6 E. & B. 937; *The Jurats of Romney Marsh v. The Corporation of the Trinity House*, L. R., 5 Ex. 204; 7 Ex. 247, and the cases cited below, which illustrate this rule.

(*x*) As to the difference which exists between the words "perils of the sea" where used in a charter party and where used in a policy of sea insurance, see

The Chasca, L. R., 4 A. & E. 447; *The Freedom*, L. R., 3 P. C. 594; and *supra*, p. 355, note (*a*). As to the meaning of perils of the seas, see also *Jackson v. Union Marine Insurance Company*, L. R., 8 C. P. 572; 10 C. P. 125.

(*y*) *Thompson v. Whitmore*, 3 Taunt. 722; *Magnus v. Buttemer*, 11 C. B. 876.

(*z*) *Phillips v. Barber*, 5 B. & A. 161.

(*a*) See the judgment of Lord Ellenborough in *Cullen v. Butler*, 5 M. & S. 464.

(*b*) 1 Park on Ins. 102. A Russian ship carrying an English cargo was stranded on Turkish territory, and in consequence disembarked its cargo, and deposited it with the Russian consul. The cargo, according to Russian law, could not be removed by the owner without certain charges being paid. These were held to be a consequence of the wreck, and recoverable from the insurers as a loss by perils of the sea. *Dent v. Smith*, L. R., 4 Q. B. 41; see also *Messina v. Petrocchino*, L. R., 4 P. C. 144.

by a peril of the sea (c). Where an electric cable was injured prior to shipment and the commencement of the risk, and consequently after its immersion the sea-water penetrated to the interior, and destroyed the insulation of the wire, it was held that this chemical action of the water on the defective cable was not an injury which could be properly referred to "perils of the sea;" since it did not arise from the external action or mechanical violence of the winds or waves, but was the natural and necessary consequence of the ordinary action of the sea-water on the defective outer covering of the cable (d).

The underwriters are liable, under these words, in respect of animals which are killed or damaged by the motion of the vessel during a storm (e), and for injuries which arise from a ship's taking the ground in a tidal harbour, owing to an accidental and extraordinary swell (f), or from her having stranded (g), or from an accidental collision (h).

If the loss is immediately occasioned by a peril insured against, the insurers are liable, although it arose remotely from the negligence or misconduct of the master and crew (i), or from a collision caused by gross negligence on the part of the crew whose ship ran into the vessel insured (j).

The mere remoteness of the cause, if there be no other independent cause intervening, will not prevent its being considered as the cause to which the loss is to be attributed. Thus, where a vessel laden with hides and tobacco, shipped water which rendered the hides putrid, and the gas which escaped from them injured the tobacco, it was held that the damage was

(c) *Taylor v. Dunbar*, L. R., 4 C. P. 206; see also *Tatham v. Hodgson*, 6 T. R. 666.

(d) *Paterson v. Harris*, 1 B. & S. 336; 30 L. J., Q. B. 354. But where an insurance was effected on the profits to be derived from a telegraph cable, and the cable was broken by an accident in the operation of laying it, and a portion of it fell overboard and could not be recovered, so that an end was put to the adventure, it was held that there was a loss by the perils insured against, *Wilson v. Jones*, L. R., 2 Ex. 139. See also *Lindsay v. Leathley*, 2 F. & F. 696, and *Jardine v. Leathley*, 3 F. & F. 80, as to injuries by wear and tear arising from the detention of the ship by previous sea perils.

(e) *Lawrence v. Aberdeen*, 5 B. & A. 107; *Gabay v. Lloyd*, 3 B. & C. 793.

M.P.

(f) *Fletcher v. Inglis*, 2 B. & A. 315. This case is said, in *Magnus v. Buttemer*, 11 C. B. 876, to have been decided on the principle that the occurrence was accidental.

(g) *Hahn v. Corbett*, 2 Bing. 205. As to what amounts to a "stranding," see *Letchford v. Oldham*, 5 Q. B. D. 538.

(h) *Buller v. Fisher*, 3 Esp. 67.

(i) *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Walker v. Maitland*, 5 B. & A. 171; *Bishop v. Pentland*, 7 B. & C. 219; see also *Heyman v. Parish*, 2 Camp. 149; *Sadler v. Dixon*, 5 M. & W. 406; *S. C. in Cam. Scacc.*, 8 M. & W. 895; *The West India Telegraph Company v. The Home and Colonial Insurance Company*, 6 Q. B. D. 51; *The General Marine Insurance v. Sherwood*, 14 Howard (Amer.) Rep. 352.

(j) *Smith v. Scott*, 4 Taunt. 120.

one which resulted, although not immediately, from the perils of the sea (†). And where the payment of a sum insured depended upon the safe arrival at certain ports of some Chinese emigrants, and they mutinied during the voyage, seized on the ship and refused to proceed on their destination, it was held that this piratical seizure of the ship (which was a peril covered by the policy) must be deemed to be the real cause of the loss of the sum insured, although the coolies might, if they had been so minded, have returned to the ship after the seizure, and have proceeded in her on the voyage (j).

A loss caused immediately by sea perils is covered by the insurance, although it might not have occurred but for the concurrent action of another cause not within the policy (k), yet the underwriters are not liable in respect of a loss arising solely from the vice of the subject of insurance (l). Where the loss is caused by the perils of the sea, and there is no warranty of seaworthiness, the underwriters are not freed from liability simply because the unseaworthiness of the ship contributed to or even indirectly caused the loss, although a different rule may apply where the assured knowingly sends the ship to sea in an unseaworthy state. For it seems that the underwriters are not liable when the misconduct of the assured is the *efficient* cause of the loss, although the immediate cause of it be a peril insured against; for the maxim, "*in jure non remota causa sed proxima spectatur*," can never be applied where it contravenes the fundamental rule of insurance law that the insurers are not liable for a loss occasioned by the wrongful act of the assured (m).

Injuries caused by rats (n), or worms are not losses by perils of the seas within the meaning of the policy (o). Upon the

(i) *Montoya v. The London Assurance Company*, 6 Ex. 451. From this and the other cases it would seem that the true application of the maxim "*causa proxima, &c.*," to the law of insurance, is this,—where there are two really independent causes moving to the loss, the last of which alone would have been sufficient to cause it, as, for instance, where there is a stranding and a consequent capture, or the like, the rule applies; where, however, there is but one *causa causans*, its mere remoteness, or the fact that its effect is increased or accelerated by other causes having no independent operation, does not make it a *causa remota* within the meaning of the rule. See also the judgments in *Thompson v. Hopper*, 6 E. & B. 937; and in *Ionides v. The*

Universal Marine Insurance Company, 14 C. B., N. S. 259.

(j) *Naylor v. Palmer*, 8 Ex. 739; *S. C.*, Cam. Scacc., 10 Ex. 382.

(k) *Dudgeon v. Pembroke*, 2 App. Ca. 284.

(l) *Fawcus v. Sargfield*, 6 E. & B. 192, and see *Paterson v. Harris*, 1 B. & S. 336.

(m) See the judgment in *Thompson v. Hopper*, 6 E. & B. 937. In these cases the maxim cited in the text is qualified by another legal maxim, "*dolus circuitu non purgatur*." *Ib.* See also the judgment in *Dudgeon v. Pembroke*, L. R., 9 Q. B. 593, affirmed 2 App. Cas. 284.

(n) *Hunter v. Potts*, 4 Camp. 203; see also *Laveroni v. Drury*, 8 Ex. 166, and the foreign authorities there cited.

(o) *Rohi v. Parr*, 1 Esp. 444. In

principle that the loss must be real and immediately caused by the sea, it has been decided that the insurer of goods is not liable when they are sold by the master to defray the expenses of repairs rendered necessary by a tempest; for although the same sea peril occasioned the damage for the reparation of which the goods were sold, the want of funds *aliunde*, obliged the captain to have recourse to the sale of the goods (*p*). Where a ship insured by a policy to which a running down clause was not attached came into collision with another vessel, and an arbitrator awarded that each ship should bear half of the aggregate loss, and by reason of this decision the ship insured had to pay a balance to the other ship, this loss was held not to be covered by the policy. It was also held in the same case, that the underwriters were not liable for the wages and provisions of the crew whilst the ship was detained in port in order to repair other damage done to her by perils of the sea (*q*).

Where goods were insured with a warranty "free from all consequences of hostilities," and the vessel in which they were shipped went ashore partly in consequence of the extinguishment of a coast light by the Confederate authorities in America, which had been done with the object of injuring the Federal shipping, it was held that the proximate cause of the loss was a peril of the sea, and therefore did not fall within the exception (*r*).

The words "all other perils, losses and misfortunes," &c. (*s*), do not cover losses which arise from mere delay caused by tempestuous weather (*t*). They, however, include all losses which, although not covered by the earlier and more definite words, are losses *ejusdem generis*, such as the sinking of a ship

Phillips on Ins. c. 13, s. 8, it is observed, that if the injury to the ship by worms arose from the loss by a sea peril of the protection of the copper sheathing, the insurer might reasonably be charged. See also *Hazard v. The N. E. Marine Insurance Company*, 1 Sumner (American) Rep. 218.

(*p*) *Powell v. Gudgeon*, 6 M. & S. 431; *Sarguy v. Hobson*, 4 Bing. 131; see also *Benson v. Duncan*, 6 Ex. 644; *Greer v. Poole*, 5 Q. B. D. 272.

(*q*) *De Fauz v. Salvador*, 4 A. & E. 420; 1 Bing. N. C. 526; *The General Marine Insurance Company v. Sherwood*, 14 Howard (American) Rep. 352.

(*r*) *Ionides v. The Universal Marine Insurance Company*, 14 C. B., N. S. 259. In this case some of the cargo might have been saved, but for the interference of the Confederate troops. This portion was held to be within the warranty.

(*s*) *Ante*, p. 445. As to the meaning of a restriction confining the insurance to "absolute damage caused by the perils insured against, see *Forwood v. The North Wales Mutual Marine Insurance Company*, 5 Q. B. D. 57.

(*t*) See *Taylor v. Dunbar*, L. R., 6 C. P. 206; *Tatham v. Hodgson*, 6 T. R. 656, *ante*, p. 481.

and cargo which was fired at by mistake (*z*), damage done by wind and weather (*a*), and injury to cargo from water which flowed through the discharge pipe of a steamer whilst in dock (*b*). So also, in the case of a steamship, injury to the ship caused by an explosion of the boiler, is covered by these words (*c*). The underwriters are not liable under the ordinary form of policy for losses occurring *on shore* to goods landed for trading purposes (*d*).

Presumptions
as to loss.

In the absence of any express stipulation in the policy, a vessel which is not heard of for a reasonable time is presumed to have perished by a peril of the sea. What is such a reasonable time as to give rise to this presumption depends, not upon any fixed rule of law, but upon the circumstances of each particular case (*e*). The Courts will not act on mere rumours; it must be shown that no intelligence has been received from persons capable of giving an authentic account. Proof that a few days after the ship's sailing a report was heard at the place whence she sailed that she had foundered, but that the crew were saved, was held, however, to be sufficient *prima facie* evidence of a loss by perils of the sea; although the assured did not call any of the crew, or show that he was unable to procure their attendance (*f*). And where evidence was given that an outward bound vessel had not been heard of in this country for nearly two years after she had sailed, it was held that the jury might presume her loss, and that the plaintiff need not call witnesses from her port of destination to prove that she had never arrived there (*g*). In all these cases, however, the assured must prove that when the vessel left port she was bound upon the voyage insured (*h*). If, after the underwriters have paid as upon a lost ship, she reappears, she will be treated as abandoned, and as belonging to them (*i*).

(*z*) *Cullen v. Butler*, 5 M. & S. 461; see also 2 Wms. Saund. 202a, note (14).

(*a*) *Phillips v. Barber*, 5 B. & A. 161.

(*b*) *Davidson v. Burnand*, L. R., 4 C. P. 117; see also *Good v. The London Steamships Owners' Mutual Protecting Association*, L. R., 6 C. P. 563.

(*c*) *The West India Telegraph Company v. The Home and Colonial Insurance Company*, 6 Q. B. D. 51.

(*d*) *Harrison v. Ellis*, 7 E. & B. 465.

(*e*) *Green v. Brown*, 2 Str. 1199; *Newby v. Read*, 1 Park on Ins. 106; *Houstman v. Thornton*, Holt, 242. See also *per curiam* in *Wilson v. Jones*,

L. R., 2 Ex. 143. By the French law, the assured may, in the case of ordinary voyages, abandon if he receives no news of the ship for a year after her sailing, or for any one entire year. In long voyages the period fixed is two years. Code de Comm. Art. 375. See as to the distinction between ordinary and long voyages, *ib.* Art. 377.

(*f*) *Koster v. Reed*, 6 B. & C. 19.

(*g*) *Tcemlow v. Oscwin*, 2 Camp. 85.

(*h*) *Cohen v. Hinckley*, 2 Camp. 51; *Marshall v. Parker*, *ib.* 69; *Koster v. Innes*, R. & Moo. 333.

(*i*) *Houstman v. Thornton*, Holt, 242.

The insurers are liable for a loss by fire, whether it be occasioned by the act of God, as by lightning or other unavoidable accident, or by the negligence of the master or mariners (*k*). They are also liable if the vessel be burnt in the discharge of a duty to the state; as where a ship chased by a privateer was burnt by the master, in order to prevent her falling into the hands of the enemy (*l*).

In a case at Nisi Prius, it was ruled by Lord Ellenborough that if goods are destroyed by a fire arising from their having been shipped in such a state as to generate heat and ignite spontaneously, the assured cannot recover; as the loss is in this case the consequence of his own improper act (*m*).

A loss by enemies occurs when the vessel is captured, or injured *jure belli*; that is, by the subjects of a country at war with that to which the ship insured belongs (*n*); and an actual capture made by a lawful authority, although at a time when war had not been declared against the country to which the ship belonged, and therefore one that could not be sustained, has been held to be within a warranty against "capture and seizure" contained in a policy of insurance (*o*). But a seizure by a foreign government for contravention of revenue laws, does not fall within the word "capture" (*p*). The assured on goods may recover for a loss by capture, although it was effected through a barratrous agreement made by the master of the ship, to which the assured was no party (*q*). An insurance in this country against British capture is, as we have seen, void (*r*). In

(*k*) *Busk v. The Royal Exchange Assurance Company*, 2 B. & A. 73.

(*l*) *Gordon v. Rimmington*, 1 Camp. 123. An insurance on the ship, body, tackle, &c., with liberty to stay at any ports or places, was held to cover a loss where the sails, tackle, &c. of a ship were consumed by an accidental fire while they were in a warehouse upon a sand bank in the Canton River, where they had been placed in accordance with the usage of the voyage. This was held to be a loss by fire during the voyage. *Pelly v. The Royal Exchange Assurance Company*, 1 Burr. 341. But under the ordinary policy the underwriters are not liable for a loss by fire occurring on shore to a portion of the cargo which has been landed. *Harrison v. Ellis*, 7 E. & B. 465. In some cases where ships are lying in dock special insur-

ance against fire are entered into; see *The Beacon Life Insurance Company v. Gibb*, *Pearson v. The Commercial Union Insurance Company*, 1 App. Cas. 500. A general policy covers the risk of fire in a steamboat as in any other vessel. *Pattison v. Mills*, 1 Dowl. & C. C. 342; 2 Bligh, N. S. 519.

(*m*) *Boyd v. Dubois*, 3 Camp. 133; see also *Austin v. Drewe*, 6 Taunt. 436; *Koebel v. Saunders*, 17 C. B., N. S. 71.

(*n*) See 1 Park on Ins. 108. See also *post*, Insurance, Chap. VII. Pt. II., the cases decided upon the warranty of freedom from seizure or capture.

(*o*) *Perrell v. Hyde*, 5 E. & B. 607.

(*p*) *Matthis v. Potts*, 3 B. & P. 23.

(*q*) *Arcangelo v. Thompson*, 2 Camp. 620.

(*r*) *Ante*, p. 440.

accordance with the rule that the proximate cause is that to which a loss is to be attributed, it has been held that where a ship was driven by stress of weather on an enemy's coast, and was consequently captured, the loss was a loss by capture, and not by the perils of the sea (s).

Although the title to a ship by capture is not complete until condemnation (t), the right of the assured to recover under the policy for a capture does not depend upon that step being taken, but accrues as soon as he has sustained an actual loss (u). Where the captain, after capture and recapture, acting with *bona fides*, sold the ship and cargo, it was held that the assured might recover as for a total loss (x). And a total loss by abandonment, made upon sufficient ground after capture, will not be converted into an average loss by a return of the vessel under conditions which make it uncertain whether the assured may not have to pay more than her worth (y). The underwriters cannot, however, be made liable for more than the actual loss (z); if, therefore, before the abandonment there has been a re-capture, so as to fix the loss at that time as an average only, the assured cannot recover as for a total loss (a), although, when he gave notice of the abandonment, he had received intelligence of the capture, but not of the re-capture (b). So, where the notice of abandonment was not assented to by the underwriter,

(s) *Green v. Elmslie*, Peake, 278, 3rd edit.

(t) *Ante*, pp. 64, 68.

(u) See the judgment of Lord Mansfield in *Goss v. Withers*, 2 Burr. 694; see also *Hamilton v. Mendes*, *ib.* 1198, and *Pond v. King*, 1 Wils. 191. See also *Stringer v. The English Insurance Company*, L. R., 5 Q. B. 599.

(x) *Miles v. Fletcher*, 1 Doug. 231. On the continuance of an embargo the owner may abandon. *Rotch v. Edie*, 6 T. R. 413.

(y) *McIver v. Henderson*, 4 M. & S. 576; see also *Cologan v. The London Assurance Company*, 5 M. & S. 447. The cases establish the principle, that if once there has been a total loss by capture, this is construed to be a permanent total loss, unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration. It is immaterial that he has the mere right to obtain it; for if that were enough to prevent a total loss, there could never be a

total loss in the case of a capture by pirates, who have never a right to the possession. See the judgment of Lord Campbell, C. J., in *Dean v. Hornby*, 3 E. & B. 180; see also *Lozano v. Janson*, 2 E. & E. 160, where there had been a wrongful seizure by a British ship of war, and it was held that the assured was entitled to recover as for a total loss at the time when the action was brought, although previously to this the Privy Council had ordered restitution of the ship, and of such part of the cargo as was unsold.

(z) See the judgment of Lord Mansfield in *Goss v. Withers*, 2 Burr. 694.

(a) *Hamilton v. Mendes*, 2 Burr. 1198.

(b) *Bainbridge v. Neilson*, 10 East, 329. In this case the property was actually restored before the action was brought. The owners may recover for a total loss, even after a re-capture, if up to the commencement of the action they have neither had actual possession nor the means of obtaining it. *Dean v. Hornby*, 3 E. & B. 180.

and before action brought, the ship was re-captured and arrived at her destined port, having sustained only a partial loss (c). It was held whilst the statutes prohibiting the ransom of British ships were in force, that a re-purchase by the owner after a capture was illegal as amounting to a ransom; and that consequently the owner could not recover from the insurers the amount which he has paid as purchase-money (d). The insurers are liable, however, for payments made *bond fide* to compromise a suit of condemnation (e).

The next protection is against "pirates, rovers, and thieves." We have already said that pirates are considered as "*hostes humani generis*." They are never recognized as enemies, the word "enemy" applying to states (f); nor are they included in the expression "kings, princes, and people;" for the latter word is to be construed according to the maxim "*noscitur a sociis*" (g). Pirates,
rovers and
thieves.

Jettison occurs where goods are thrown overboard for the preservation of the ship and cargo, or for any other sufficient cause (h); as, for instance, to prevent her capture by an enemy (i). In this case the loss is covered on the same principle on which the destruction of the vessel herself is protected, where she is burnt to prevent her falling into the hands of an enemy (j). Jettisons.

(c) *Patterson v. Ritchie*, 4 M. & S. 393; see also *McMasters v. Shoolbred*, 1 Esp. 237.

(d) *Havelock v. Rockwood*, 8 T. R. 268. See 2 Geo. 3, c. 25, and 33 Geo. 3, c. 66, which are both now repealed. A subsequent statute, the 43 Geo. 3, c. 72, provided that agreements, &c. for the ransom of British ships should be void. The 5 & 6 Will. 4, c. 41, repealed this provision, and enacted that such agreements should be deemed to be made for an illegal consideration; but this enactment was in its turn repealed by the 37 & 38 Vict. c. 35, and the only statutory provision now in force with respect to ransom is apparently the 27 & 28 Vict. c. 25, s. 45, which empowers the Queen in Council to make orders prohibiting or allowing the ransom of British ships taken from the enemy. No Order in Council, however, appears to have been made under this section. As to the question of the legality of the ransom of captured

ships apart from the statute in this country, see *The Ships taken at Genoa*, 4 Rob. 388; *Wilson v. Bond*, 1 Ld. Raym. 22; see also *supra*, p. 160.

(e) *Berens v. Rucker*, 1 W. Bl. 313.

(f) See *ante*, pp. 64 and 351, note (h); also Molloy, B. 1, c. 4; 1 Beawes Lex Merc. 351, and *Dean v. Hornby*, 3 E. & B. 180.

(g) *Nesbitt v. Lushington*, 4 T. R. 783. As to the meaning of "thieves," where that word is used in a bill of lading, see *supra*, p. 353.

(h) See *ante*, p. 426; and *Johnson v. Chapman*, 19 C. B., N. S. 593.

(i) *Butler v. Wildman*, 3 B. & A. 399. It was not necessary, however, in that case to decide the point, since, if the loss did not fall within the meaning of the word "jettisons" in the policy, it was covered by the general words "all other losses and misfortunes," which were also used in it.

(j) See *ante*, p. 485.

The insured is entitled to recover the whole insurance, without deducting what he may be entitled to receive as general average, and the underwriter stands in his place, and may recover any general average due from other cargo owners (*k*). In a recent case it was held that a custom that underwriters are not liable for general average in respect of the jettison of deck cargo is valid, and does not contradict the terms of a policy in the ordinary form (*l*).

Arrests, restraints, &c.

The words "arrests, restraints, and detainments of all kings, princes, and people," are properly applicable only to the ruling power of a country, and not to pirates or any other lawless power (*m*); they apply, however, not only to hostile acts, but also to those which are committed by the government of which the assured is a subject; as, for instance, to the seizure of the vessel by the owner's government for the purpose of using her as a fire-ship (*n*); and to the wrongful seizure of an English ship and cargo by a British ship of war (*o*).

The detention of a neutral vessel within a blockaded port is, it seems, a "restraint of princes" within the meaning of this clause (*p*).

An insurance in this country by a foreigner against a British embargo would probably be held to be void upon the same principle as an insurance against British capture (*q*).

It was at one time considered that a foreigner could not insure in this country against the acts of his own government, on the ground that he himself was to be considered as a party to them (*r*); but later cases have shown that this is only an implied exclusion from the reason and fitness of the thing; and that if a particular commerce is known to the underwriters to be carried on, notwithstanding its prohibition by the foreign state,

(*k*) *Dickenson v. Jardine*, L. R., 3 C. P. 639.

(*l*) *Müller v. Tetherington*, 6 H. & N. 278; S. C., Cam. Scacc., 7 H. & N. 954.

(*m*) *Nesbitt v. Lushington*, *ubi supra*.

(*n*) *Green v. Young*, 2 Lord Raym. 840. "Arrest" is a taking of goods with the intention of restoring them at one time or another. "Restraint" is preventing the goods being got away without laying hands on them. Per Brett, J., in *Rodocanachi v. Elliot*, L. R., 8 C. P. 659.

(*o*) *Lozano v. Janson*, 2 E. & E. 160. See also *Stringer v. The English and Scottish Marine Insurance Company*,

L. R., 5 Q. B. 599.

(*p*) See *Geipel v. Smith*, L. R., 7 Q. B. 404; *Rodocanachi v. Elliot*, L. R., 8 C. P. 656; 9 C. P. 528.

(*q*) *Ante*, p. 440; and see the judgment of Lord Alvanley in *Touteng v. Hubbard*, 3 B. & P. 298. In *Mullett v. Shedden*, 13 East, 304, this point does not appear to have been discussed.

(*r*) *Conway v. Gray*, 10 East, 536; *Mennett v. Bonham*, 16 East, 477; *Flindt v. Scott*, *ib.* 525. *Conway v. Gray* was disapproved of in the Exchequer Chamber in *Aubert v. Gray*, 3 B. & S. 163, 169.

they are liable to a foreign assured on the policy (s). And in a recent case, the rule that the act of the government of a country is to be treated for this purpose as the act of each subject of it was denied, and it was held that this rule, even if correct, could not be applied to the case of an embargo laid on in a time of peace between the countries of the insurer and assured, for a purpose wholly unconnected with hostility either existing or expected (t). Such a risk, however, is not protected if the nationality of the assured is not communicated to the underwriter; for the former might not only omit to take proper means for preventing the loss, but might facilitate it by giving information to his own government, a possibility which materially varies the risk (u).

The detention must be the immediate cause of loss; if, therefore, there is an embargo at the port of destination which compels the master to avoid proceeding there, and the object of the voyage is thereby defeated, the assured is not protected (v); nor can the policy be extended so as to cover a deviation rendered necessary by an embargo, or the like (w). Where, however, a vessel chartered to a port in America was insured on her voyage out and home, and on arrival at her port of destination her master found that the port was under an embargo, but the ship was permitted either to return with the cargo on board, or to discharge her cargo and return in ballast, upon which the master discharged the cargo, and, after waiting eighteen months until the embargo ceased, returned with a homeward cargo, it was held that the underwriters were liable for a loss on the home voyage (x).

(s) *Simeon v. Bazett*, 2 M. & S. 94; *S. C.* in error, nomine *Bazett v. Meyer*, 5 Taunt. 824; see also *Flincht v. Scott*, in error, *ib.* 674, where it was held that a foreigner who engages, under a licence from this country, in a trade prohibited by the law of his own country, separates himself from the acts of his own government. In America it has been held that there is no objection to insurances on this ground. 3 Kent Com. 292.

(t) *Aubert v. Gray*, 3 B. & S. 163; *S. C.* in Cam. Scacc., *ib.* 169; 32 L. J., Q. B. 50. The Court of Exchequer Chamber expressly abstained from saying that if the act of seizure had been a lawful act under the municipal law of the country to which the assured belonged, it would, as against him, have been covered by the insurance.

(u) *Campbell v. Innes*, 4 B. & A. 423.

(v) *Hadkinson v. Robinson*, 3 B. & P. 388; *Lubbock v. Rowcroft*, 5 Esp. 50; *Forster v. Christie*, 11 East, 205. As to what captures are covered by a warranty against the ship's seizure in her port of discharge, see *Dalglish v. Brooke*, 15 East, 295; *Keyser v. Scott*, 4 Taunt. 660. Where goods are landed in the usual manner, and then seized, they are not protected, even although they have not reached the possession of the consignee. See *Brown v. Carstairs*, 3 Camp. 161. The cases in which the seizure has arisen from the breach of a warranty will be found *post*, Chap. VII. Pt. II.

(w) *Parkin v. Turno*, 2 Camp. 69; *S. C.* 11 East, 22; *Blackenhagen v. The London Assurance Company*, 1 Camp. 454.

(x) *Schroder v. Thompson*, 7 Taunt. 462.

Barratry.

We have already seen what constitutes barratry (*x*). Losses arising from barratry need not follow immediately upon the act of barratry; the underwriter is not, however, liable if the loss does not occur until after the expiration of the risk described by the policy, although the act of barratry have been committed during the continuance of the risk. Thus, where a ship was insured for a voyage, and after she had been in port twenty-four hours was seized, in consequence of an act of smuggling committed by the master during the voyage, this was held not to be a loss within the policy (*y*).

Suing and labouring clause.

After enumerating the perils insured against, the policy provides that, in the event of loss or misfortune, the assured may "sue, labour and travel" for the defence or recovery of the goods or ship without prejudice to the insurance, and that the assurers are to contribute to the charge.

This is called the "suing and labouring clause." Its object is that if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result, in proportion to what they would have had to pay if such detriment had come to a head for want of timely care (*z*). Thus the clause includes reasonable expenses incurred, as freight paid for forwarding in another ship goods that would otherwise have been a loss to the insurers, or charges paid for unshipping cargo in order to avert a total loss (*a*). It does not, however, apply where money is expended in the forwarding of goods insured if they be not in peril though

(*x*) *Ante*, p. 145; and see *The Australian Insurance Company v. Jackson*, 33 L. T. 286.

(*y*) *Lockyer v. Offley*, 1 T. R. 252.

(*z*) See per Willes, J., in *Kidston v. The Empire Insurance Company*, L. R., 1 C. P. 543; 2 C. P. 357; and the judgment in *Meyer v. Ralli*, 1 C. P. D. at p. 373.

(*a*) *Kidston v. The Empire Insurance Company*, *ubi supra*, where the effect

of this clause is fully explained; *Lee v. The Southern Insurance Company*, L. R., 5 C. P. 397; *Meyer v. Ralli*, 1 C. P. D. 372. The expenses recoverable under this clause are designated among underwriters as "particular charges," and not as "particular average." *Kidston v. The Empire Marine Insurance Company*, *ubi supra*.

of a perishable nature (*b*); nor does it include salvage expenses, for these are assessed upon the principle not of *quantum meruit*, but of the maritime law which gives to those who bring in the ship a sum out of proportion to the expense actually incurred and the service rendered, because if the effort to save the ship had been unsuccessful nothing would have been payable (*c*); nor a claim for the costs of successfully defending a suit for damage done to a vessel run down by the ship insured (*d*).

Eighthly, as to the *memorandum*. In order to prevent the underwriters from being liable for injury to goods of a peculiarly perishable nature, and for minor damages, the *memorandum* is inserted (*e*). THE MEMORANDUM.

The usual terms of this part of the policy are as follows:—

N.B.—(1) Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general or the ship be stranded; (2) sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five per cent.; (3) and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general or the ship be stranded.

The word *average* is not used in the memorandum in the sense spoken of in a former Chapter. It does not mean here a general loss to which all must contribute, but a *partial damage to particular goods* (*f*). Average within its meaning.

The meaning of this obscure memorandum is this: on the articles mentioned in paragraph (1) the underwriters are not to be liable for any partial damage, unless the loss is in the nature of a general average, or the ship is stranded; on the articles mentioned in paragraph (2) they are not to be liable for any damage (except loss in the nature of a general average) unless it equals or exceeds five per cent. of their value; and (3) on the

(*b*) *The Great Indian Peninsula Railway Company v. Saunders*, 1 B. & S. 41; 30 L. J., Q. B. 218; *S. C.*, 2 B. & S. 266; 31 L. J., Q. B. 206; *Booth v. Gair*, 15 C. B., N. S. 291.

(*c*) *Ditcheson v. Lohre*, L. R., 4 App. Cas. 755, overruling the decision below, 3 Q. B. D. 558; see also *Dixon v. Whitworth*, 4 O. P. D. 371; reversed on appeal, W. N. 1880, p. 43, nom. *Dixon v. The Sea Insurance Company*.

(*d*) *Xenos v. Fox*, L. R., 3 C. P. 631; *S. C.*, Cam. Scacc., L. R., 4 O. P. 665;

see also *Dixon v. Whitworth*, *ubi supra*.

(*e*) It was first introduced in 1749. Observations upon the clause "*franc d'avarie*," contained in French policies, will be found in Emerigon, *Traité des Assurances*, c. xii. s. 45, where the usages of several countries upon this head are mentioned. See also Benecké, *Princ. of Indemn.* p. 487.

(*f*) The word *average* is from the Italian, "*averia*," damage.

ship, freight and all other goods, they are not to be liable for any damage (except loss in the nature of a general average), unless it equals or exceeds three per cent. of the value, or the ship is stranded (*g*).

The words in the memorandum do not exclude the operation of the suing and labouring clause, or prevent the underwriters being liable to pay to the assured whatever sums are recoverable under that clause (*h*).

It has been held that the word corn in the memorandum includes malt (*i*), and also peas and beans (*j*), but not rice (*k*).

As in other cases, a loss is, for these purposes, total, if the effect of the damage is such that the goods are lost to the assured (*l*). Thus, where a cargo of fruit was so damaged by sea water that the authorities refused to allow it to be landed at a port to which the ship was driven, and it was there thrown overboard, it was held that the underwriter was liable (*m*). Where the cargo, although damaged, arrives at its destination, the underwriter is protected by the exception (*n*). And if the vessel is wrecked short of its destination, and the cargo is got ashore in a damaged condition *in specie*, but not being of a perishable nature, it might have been conveyed to the port to which it is consigned without any loss of its specific character, the underwriter is protected (*o*).

(*g*) See 1 Arnould on Ins. 33 (2nd edit.). Policies on cargoes destined to foreign ports sometimes contain a provision that the underwriter is "to pay general average as per foreign statement, if so made up," or to the like effect. Where this is inserted the underwriters are bound by a foreign adjustment in accordance with the law in force where it is made, although its effect may be to treat as general average what, according to English law, would be particular average, *Harris v. Scaramanga*, L. R., 7 C. P. 481. *Hendricks v. The Australasian Insurance Company*, L. R., 9 C. P. 460; *Mauro v. The Ocean Marine Insurance Company*, ib. 595, and L. R., 10 C. P. 414. See as to a similar clause in a bill of lading, *Stewart v. The West India and Pacific Steamship Company*, L. R., 8 Q. B. 88; affirmed *ib.* 362. See also *supra*, p. 436. In the absence of such a clause, the practice of average adjusters, however long established, cannot control the law, *Atwood v. Sellar*, 4 Q. B. D. 342; 6 Q. B. D. 286.

(*h*) See *Kidston v. The Empire Marine Insurance Company*, L. R., 2 C. P. 357; *Meyer v. Ralli*, 1 C. P. D. 358, 373.

(*i*) *Moody v. Surridge*, 2 Esp. 633.

(*j*) *Mason v. Skurray*, 1 Park on Ins. 174.

(*k*) *Scott v. Bourdillon*, 2 N. R. 213.

(*l*) See *Roux v. Salvador*, 3 Bing. N. C. 266, and the cases cited *post*, Chap. VII., Part II., CONSTRUCTIVE TOTAL LOSS. Whether a loss is total or partial depends upon general principles, which apply equally to the articles which are within the memorandum, and to those which are covered by the policy generally. See the judgment in *Roux v. Salvador*, *ubi supra*.

(*m*) *Dyson v. Rowcroft*, 3 B. & P. 474; *Cocking v. Fraser*, 1 Park on Ins. 181; *Cologan v. The London Assurance Company*, 5 M. & S. 447; *Parry v. Aberdeen*, 9 B. & C. 411.

(*n*) *Mason v. Skurray*, 1 Park on Ins. 191; *Anderson v. The Royal Exchange Assurance Company*, 7 East, 38.

(*o*) *Thompson v. The Royal Exchange Assurance Company*, 16 East, 214;

But if goods of a perishable nature are damaged by the sea, and necessarily landed before the termination of the voyage, and it is found that they cannot be brought to their destination without losing their original character, owing to their being unable to bear the further voyage in their damaged condition, the circumstance of their existing *in specie* at that forced termination of the risk does not prevent the assured from recovering, although the goods are sold in their original character (*p*). Where goods are sold under such circumstances the question is, not whether a prudent person uninsured would have sold them, but whether the goods are in such a state that, if brought home, they could be sold for an amount exceeding the expense of unshipping, drying, or warehousing, and transshipping and salvage. If this is not so, the loss is total (*q*). In such a case the original freight which would have to be paid if the goods were carried to the port of discharge, either by the vessel in which they were originally shipped or by one substituted, ought not to be taken into account; for that is a charge to which the goods would be liable when delivered whether affected or not by perils of the sea (*r*).

Where in the memorandum the words "warranted free from particular average" are used, these words are not confined to losses arising from injury to the goods themselves, but amount to a warranty against any loss other than a total loss, or general average; and therefore, under a policy in the ordinary form on goods, the underwriters are not liable for expenses incurred in relation to the goods, unless such expenses are paid to avert a general average loss, and are therefore recoverable under the suing and labouring clause (*s*).

Glennie v. The London Assurance Company, 2 M. & S. 371; *Hedburg v. Pearson*, 7 Taunt. 154.

(*p*) *Roux v. Salvador*, 3 Bing. N. C. 266, reversing *Roux v. Salvador*, 1 Bing. N. C. 526; *Navone v. Haddon*, 9 C. B. 30; *Mavro v. The Ocean Marine Insurance Company, L. R.*, 9 C. P. 595.

(*q*) *Rosetto v. Gurney*, 11 C. B. 176; *Reimer v. Ringross*, 6 Ex. 263.

(*r*) *Farnsworth v. Hyde*, L. R., 2 C. P. 204.

(*s*) *Meyer v. Ralli*, 1 C. P. D. 372, 373; *The Great Indian Peninsula Railway Company v. Saunders*, 1 B. & S. 41; *S. C.* in *Cam. Scacc.*, 2 B. & S. 266. In this case iron rails were shipped to a foreign port, freight to be paid here,

ship lost or not lost. The shippers insured them by a policy in the ordinary form, "warranted free from particular average, unless the ship be stranded, sunk or burnt," with the usual clause authorizing the assured to "sue, labour and travel for, in and about the defence, safeguard and recovery of the goods." The ship was neither stranded, sunk nor burnt, but there was a constructive total loss of her by perils of the sea. The rails were saved, and sent on in other vessels to their destination, for which the assured was compelled to pay freight to an amount not exceeding the value of the rails. It was held that this freight was not recoverable under the policy. See

Where the words used were "free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking or fire," and during the voyage the ship from bad weather was compelled to put into port, and was there found to be unfit to proceed and together with the cargo was sold, it was held that the plaintiff might recover for an average loss (*t*).

It was formerly considered that the cases had established that, whether a loss was a total loss of part, or an average or partial loss of the whole of the cargo, depended upon the mode in which the cargo was stowed, and that if it was carried in casks or packages which were capable of separate valuation, a loss of one was a total loss to that extent (*u*), but that if the cargo was stowed in bulk (*x*), or a portion only of each cask or the like was damaged (*y*), this was to be considered an average loss. This important question was, however, discussed before the Exchequer Chamber in a modern case, and that Court, after reviewing the earlier decisions, and explaining that their effect had been to a great extent misapprehended, held that where memorandum goods of the same species are shipped, whether in bulk or in packages not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, although consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils (*z*).

Where, however, "master's effects" were insured "free from all average," and some of the articles were wholly lost, but others were saved, it was held that the master might recover for those which were lost, since the word "effects" was used merely to save the enumeration in the policy of the articles insured, and it was therefore intended that the insurer should

also *Booth v. Gair*, 15 C. B., N. S. 291; and as to the liability of the insurer under the suing and labouring clause, in a policy on freight, *Kidston v. Empire Insurance Company*, *ante*, p. 490, note (*a*).

(*t*) *Carr v. Royal Exchange Assurance Company*, 5 B. & S. 433.

(*u*) See the judgment of Lord Mansfield in *Lewis v. Rucker*, 2 Burr. 1170; and *Davy v. Milford*, 15 East, 559.

(*x*) *Hills v. The London Assurance*

Company, 5 M. & W. 569.

(*y*) *Hedburg v. Pearson*, 7 Taunt. 154.

(*z*) *Ralli v. Janson*, 6 E. & B. 423. See the judgment of the Court in which the authorities, both English and foreign, are fully collected and commented on. The Court expressed no opinion as to the liability of the underwriters in these cases, in respect of goods of different species.

be liable for any total loss of the specific things referred to by this general word (a). So, where the insurance was for "240*l.*, on goods so valued against total loss only," and the assured put on board goods of different kinds and descriptions, and in separate cases and packages, and all the goods were lost except three of the packages, it was held that he might recover in respect of the packages which were totally lost (b). Where the policy was "on rice to be declared warranted free of particular average," it was held that the assured could not, by indorsing on the policy a declaration of interest, with a separate valuation of each bag of rice, create a separate insurance on each bag (c).

Where a policy contained, in addition to the usual memorandum, a clause binding the underwriter to pay average separately upon each package, this was held not to prevent the assured, in the event of some packages only being injured, from selling the whole and recovering for an average loss upon the whole exceeding three per cent. (d).

Under the words "are warranted free from average under three per cent.," the underwriter is liable if it appears at the end of the voyage that the aggregate amount of several partial losses equals or exceeds three per cent., although each taken separately is under that amount (e). The proportion which the average bears to the cargo must be calculated with reference to the state of the cargo at the time at which the loss happens (f).

By the warranty of goods free from average, unless "the ship be stranded," the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of it, although the fact cannot always be ascertained (g). Accordingly, where a stranding has taken place, an average loss becomes a charge upon the underwriters, whether it has been in reality occasioned by the stranding or not (h), provided the stranding took place

(a) *Duff v. Mackenzie*, 2 C. B., N. S.

16. (b) *Wilkinson v. Hyde*, 2 C. B., N. S.

30. (c) *Entwistle v. Ellis*, 2 H. & N. 549.

(d) *Hagedorn v. Whitmore*, 1 Stark.

167. As to the effect of a separate

valuation of the hull and machinery of

a steamer where average expenses are

incurred for the benefit of the whole

adventure, see *Oppenheim v. Fry*, 3 B.

& S. 873; *S. C.*, Cam. Scacc., 5 B. &

S. 348.

(e) *Blackett v. The Royal Exchange Assurance Company*, 2 O. & J. 244.

(f) *Rohi v. Parr*, 1 Esp. 446.

(g) See per Lord Kenyon in *Nesbitt*

v. Lushington, 4 T. R. 787.

(h) See per Lord Tenterden in *Wells*

v. Hopwood, 3 B. & Ad. 35; see also

Wilson v. Smith, 3 Burr. 1550; *Burnett*

v. Kensington, 7 T. R. 210; *Harman v.*

Vaux, 3 Camp. 429.

while the goods were on board. Where it does not occur until after they are landed the liability of the underwriter is not affected, although the landing took place at an intermediate port, and in consequence of the goods being damaged (i).

To constitute a stranding a striking is not sufficient. If the ship merely touches or strikes and gets off again, how much soever she may be injured, she is not stranded; but if she settles and remains for any time, this is a stranding, without reference to the degree of damage which she sustains (k). A resting for fifteen or twenty minutes has been held to be a stranding (l). It is immaterial whether it be upon a bank or a rock (m). It is not, however, every stationary taking the ground that constitutes a stranding. Thus, where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbour, upon the ebbing of the tide, or from a natural deficiency of water, so that she may float again upon the flow of the tide or increase of the water, this is not a stranding within the meaning of the memorandum (n). So, when a vessel took the ground several times in going up a harbour in the ordinary course of navigation from the shallowness of the water, this was held to be no stranding (o). Similarly where a vessel took the ground in a tidal harbour where it was intended that she should do so, at the time she was moored, and was injured by striking against some hard substance, this was also considered not to be a stranding (p). But it is otherwise where the ground is taken under circumstances of such an accidental and unforeseen character as not to be in the usual course of navigation (q). And where a ship was improperly fastened to a pier in a basin, so that she took the ground, and when the tide left her she fell over and

(i) *Roux v. Salvador*, 1 B. N. C. 526, overruled, but not on this point, 3 B. N. C. 266.

(k) *Harman v. Vaux*, *ubi supra*; *Macdougall v. The Royal Exchange Assurance Company*, 1 Stark. 130, in which Lord Ellenborough said, "A striking is not sufficient; it is merely temporary, or as it has been vulgarly described, a touch and go; but in order to constitute a stranding, the ship must be stationary. See *S. C.*, 4 M. & S. 603.

(l) *Baker v. Towry*, 1 Stark. 436.

(m) *Ib.*

(n) *Magnus v. Buttemer*, 11 C. B. 867; 3 Kent Comm. 323, note (c). See also the judgment in *Corcoran v. Gurney*, 1

E. & B. 456.

(o) *Hearn v. Edmunds*, 1 B. & B. 388.

(p) *Kingsford v. Marshall*, 8 Bing. 458.

(q) See the judgment of Lord Tenterden in *Wells v. Hopwood*, 3 B. & Ad. 35; *Letchford v. Oldham*, Court of Appeal, 5 Q. B. D. 538. In this last case a ship in taking the ground in a tidal harbour became stranded, owing to her not resting on an even keel, but pitching by the head into a hole the existence of which was not known, which it appeared had been formed by the action of the paddle wheels of steamers frequenting the harbour.

was bilged, this was held to be stranding (r). So, where the water being drawn off from an inland navigation for the purpose of repairing it, a vessel settled accidentally upon some piles which were not previously known to be there (s); where a vessel, having struck upon an anchor in a harbour, was injured and in danger of sinking, and was thereupon hauled higher up the harbour and drawn upon the ground, where she remained for some time (t); where a ship under stress of weather made a tidal harbour, but it being low water she grounded there (u); and where a ship was run aground for the purpose of preventing further mischief (x); these were all held to be cases of stranding.

(r) *Carruthers v. Sydebotham*, 4 M. & S. 77; see also *Bishop v. Pentland*, 7 B. & C. 219.

(s) *Rayner v. Godmond*, 5 B. & A. 225.

(t) *Barrow v. Bell*, 4 B. & C. 736.

(u) *Corcoran v. Gurney*, *ubi supra*.

(x) *De Mattos v. Saunders*, L. R., 7 C. P. 570.

CHAPTER VII.

INSURANCE.

PART II.

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WARRANTY
EXPRESS AND
IMPLIED.What is a
warranty.

THE term *Warranty*, as used in insurance law, means any assertion or undertaking on the part of the assured, whether expressed in the contract, or capable of being annexed to it, on the strict and literal truth or performance of which the liability of the underwriter is made to depend. Warranties may be either express or implied; they are express if stated in terms in

the contract, and implied if superadded to it by implication of law or custom and known usage. In either case, and whether they are material or not to the risk (*a*), the strict performance of them is a condition precedent to the attaching of the underwriter's liability (*b*); even although the loss arise from a cause wholly unconnected with the breach of warranty (*c*), and the non-compliance with the warranty occasion no damage (*d*). Nor will a compliance with a warranty be excused by the occurrence of events over which the assured has no control (*e*). And where the warranty is of a matter which continues of importance until the risk determines, as, for instance, a warranty of neutrality, such a warranty is continuous so far as relates to the acts of the assured, whether the policy be for a voyage or for a time certain (*f*).

An express warranty must appear on the face of the policy. The contents of a separate paper, even although it is wrapt up with the policy, or pinned or wafered to it, have been held not to be a warranty, but merely a representation (*g*). If, however, the separate paper is referred to in the policy, so as to be incorporated with it, it is otherwise; as where the policy is declared to be made subject to the rules of a company or club (*h*); and a statement in the margin of the policy (*i*), or at the bottom of it (*j*), may be a warranty.

The most usual express warranties in time of peace are, that the ship is safe on a given day, and that she will sail or depart on a given day. In some cases the policy contains an express warranty of seaworthiness; such a warranty, in the case of a voyage policy, does not exclude the implied warranty of seaworthiness which exists in such policies (*k*). In time of war it is also usual to warrant that the ship will sail with convoy, and that she and her cargo are neutral property and free from con-

Express warranties usually found in policies.

(*a*) See the judgment of Lord Eldon in *The Newcastle Fire Insurance Company v. Macmorran*, 3 Dow, 262.

(*b*) *Pawson v. Watson*, 2 Cowp. 785; *De Hahn v. Hartley*, 1 T. R. 343; 2 T. R. 186.

(*c*) *Woolmer v. Muilman*, 3 Burr. 1419.

(*d*) *Rich v. Parker*, 2 Esp. 615; 7 T. R. 705.

(*e*) *Hore v. Whitmore*, 2 Cowp. 84.

(*f*) See the judgment in *Sillem v. Thornton*, 3 E. & B. 883.

(*g*) *Pawson v. Ewer*, 1 Doug. 12, note; *Pawson v. Barnevelt*, *ib.*; *Bize v.*

Fletcher, 1 Doug. 13, note.

(*h*) *Pittegrew v. Pringle*, 3 B. & Ad. 514; *Graham v. Barras*, 5 B. & Ad. 1011; *Colledge v. Harty*, 6 Ex. 205.

This rule was first acted on in cases of fire policies. See *Routledge v. Burrell*, 1 H. Bl. 254; *Worsley v. Wood*, 6 T. R. 710.

(*i*) *Bean v. Stupart*, 1 Doug. 11; *De Hahn v. Hartley*, *ubi supra*.

(*j*) *Blackhurst v. Cockell*, 3 T. R. 360.

(*k*) *The Quebec Marine Insurance Co. v. The Commercial Bank of Canada*, L. R., 3 P. C. 234.

fiscation or seizure in the port of discharge. In policies on goods in time of war there is also in some cases an express warranty against the goods being contraband of war (*l*). We will consider these warranties in order.

Express warranty of safety on a given day.

A warranty that the ship or goods are safe on a particular day is complied with if they are safe at any time on that day, although they were lost at the time when the underwriter subscribed the policy (*m*). Where a ship was insured at and from one port to another, a warranty that she was "in port" on a certain day was held, to mean that she was on that day safe in the port from which the voyage insured was to commence, and that the warranty was not satisfied by her being at that time safe in another port (*n*).

Where the words of a warranty are plain, no evidence will be admissible to prove that the ordinary construction put upon the warranty gives a meaning to it which necessitates a different meaning being put upon such words (*o*).

To sail on a given day.

A warranty to sail on a particular day, means that the ship shall be on her voyage on that day, and is, therefore, not fulfilled unless she completely unmoor on that day; although she may have her cargo and passengers on board and be ready to sail, and is only prevented by stress of weather (*p*); nor will the raising anchor and getting under sail suffice, unless at the time of her doing so she has everything ready to perform the voyage, so as to make those acts the commencement of it (*q*). If, therefore, she has not taken on board the whole of her ballast (*r*), or her full crew (*s*), or if, although she has left the harbour, she has not left prepared to proceed immediately on her voyage (*t*),

When broken.

the warranty is not complied with. Upon an insurance at and from Portneuf to London, to sail on or before the 28th October,

(*l*) See *Seymour v. The London and Provincial Marine Insurance Co.*, 41 L. J., C. P. 193. And see *supra*, p. 469.

(*m*) *Blackhurst v. Cockell*, 3 T. R. 860.

(*n*) *Colby v. Hunter*, Moo. & Malk. 81.

(*o*) *Provincial Company of Canada v. Leduc*, L. R., 6 P. C. 224.

(*p*) *Nelson v. Salvador*, Moo. & Malk. 309. See as to the construction put on the words "final sailing from the port of loading" in a charter-party, *Roelands v. Harrison*, 9 Ex. 444; as to the words "leave Amsterdam," *Van*

Baggen v. Baines, *ib.* 523; and as to the words "the ship shall be dispatched within twenty-one days after arrival," *Sharp v. Gibbs*, 1 H. & N. 801. See also *Baines v. Holland*, 10 Ex. 802.

(*q*) See the judgment of Abbott, C.J., in *Lang v. Anderdon*, 3 B. & C. 495, and *Bond v. Nutt*, 2 Cowp. 601.

(*r*) *Pittegrew v. Pringle*, 3 B. & Ad. 514.

(*s*) *Graham v. Barras*, 5 B. & Ad. 1011.

(*t*) *Thompson v. Gillespy*, 5 E. & B. 209; *Hudson v. Bilton*, 6 E. & B. 565.

it was held that the dropping down the river before that day, with a crew only sufficient for the river navigation to Quebec, where the vessel was to get her clearances, was not a compliance with the warranty (*s*). The rule laid down in these cases does not apply where a voyage is devisible into two distinct parts, requiring a different kind of seaworthiness. Thus, where ships were insured from Lyons to Galatz, to sail on or before a particular day, and they sailed before that day from Lyons, in a state fit for the river navigation down to Marseilles, but from the nature of the navigation they could not be made fit for sea till they arrived at Marseilles, it was held that the warranty had been complied with (*t*). When complied with.

It does not in such cases form any excuse for the non-fulfilment of the warranty that the vessel was prevented from leaving port by an embargo (*u*). If, however, a vessel, ready to proceed with her voyage, quits her moorings, but after sailing a short distance is detained by a subsequent occurrence, the warranty is complied with (*x*). Where a ship insured "at and from Jamaica," left her port of lading before the day on which she was warranted to have sailed, with all her cargo and clearances on board, and proceeded, in order to join convoy, to the usual place of *rendezvous* at another port of the island, where she was detained by an embargo, it was held that the warranty was complied with (*y*). So, where a ship sailed from Demerara on the day warranted, and when beyond the mouth of the river, the tide being low, she anchored for two days within a shoal which extended for some miles beyond the mouth of the river, it was held that the warranty had been observed (*z*). In such cases the vessel must sail with the *bond fide* intention of proceeding with the voyage, and not merely for the purpose of satisfying the warranty. A vessel in Dublin harbour, warranted not to sail after the 15th August, was on that day cleared and taken out of dock, and warped down the river as far as possible. The following day she was warped further down, but could not proceed to sea, owing to the state of the wind, until the 17th.

(*s*) *Ridsdale v. Newnham*, 4 Camp. 111; 3 M. & S. 456; see also *Nelson v. Salvador*, Moo. & Malk. 309.

(*t*) *Bouillon v. Lupton*, 15 C. B., N. S. 113.

(*u*) *Hore v. Whitmore*, 2 Cowp. 784.

(*x*) See the judgment of Lord Tenterden in *Pittegrew v. Pringle*, 3 B. & Ad. 514.

(*y*) *Bond v. Nutt*, 2 Cowp. 601; see also *Earle v. Harris*, 1 Doug. 357; *Thellusson v. Ferguson*, *ib.* 361.

(*z*) *Lang v. Anderson*, 3 B. & C. 495.

The Court held, that if what was done had been done colourably for the purpose of complying with the warranty, the warranty was not satisfied; but that it was otherwise if the master had acted with the *bond fide* intention of placing the ship in a more favourable position with regard to the prosecution of her voyage, or if he had acted partly with that intention, and partly in order to comply with the warranty (a).

If a vessel be insured "at and from" several ports to sail on or before a particular day, the warranty is complied with if she leaves her final port of loading before that day, although she afterwards touches at another of these ports in order to join convoy (b). Under an insurance "at and from" an island, to sail after a given day, the moving from port to port in that island before that day is not a violation of the warranty (c). Where a ship was insured "at and from New York to Quebec, during her stay there, thence to the United Kingdom, the ship being warranted to sail from Quebec on or before the 1st November," and the vessel was lost on her voyage from New York to Quebec, but she had not sailed from New York at a time reasonably sufficient to have enabled her to sail from Quebec on the day mentioned, it was held that the underwriters were nevertheless liable, since the warranty could not be extended by inference to an undertaking to leave New York by any particular time (d).

To depart.

Where the warranty, instead of being "to sail," was "to depart," it was held to be necessary that the ship should not only have broken ground on the day named, but that she should be then out of the port, or at sea (e).

To sail with
convoy.

A convoy is a naval force, appointed by the government, or by the commander of a station, to escort and protect merchant ships proceeding to certain ports. The warranty to sail with convoy is not satisfied by obtaining the protection of a man-of-war, the captain of which has not obtained orders to sail with the convoy (f). This warranty is an engagement that

(a) *Cochrane v. Fisher*, 2 C. & M. 581. On the second trial the jury found that the master had intended to sail on the 15th, and that he had used proper exertions to do so. See 1 Cr. M. & R. 809.

(b) *Wright v. Shiffner*, 2 Camp. 247; 11 East, 515.

(c) *Cruickshank v. Janson*, 2 Taunt. 301.

(d) *Baines v. Holland*, 10 Ex. 802.

(e) *Moir v. The Royal Exchange Assurance Company*, 4 Camp. 84; 3 M. & S. 461; 6 Taunt. 241; and see the cases cited *ante*, p. 500, note (p).

(f) *Hibbert v. Pigou*, 2 Park on Ins. 498. The 13 Car. 2, st. 1, c. 9, and the 22 Geo. 2, c. 33, which acts are repealed respectively by the 22 Geo. 2, c. 33, and the 23 & 24 Vict. c. 123, s. 86, directed

the ship shall sail with convoy for the whole voyage (*g*); and if a convoy be appointed for the same voyage as that on which the ship insured is bound, she must sail with that convoy. If she sail with a convoy appointed for another voyage, although the course is nearly the same for a great part of the way, this will not suffice (*h*). In practice the government usually appoints a place of *rendezvous* from which the convoy sails, and the warranty is satisfied if the ship sail with convoy thence (*i*).

Where a policy provided that a ship might sail to the place of *rendezvous* to join convoy, it was held that she was protected in proceeding thither, although there was a convoy for ships on other destinations between her loading port and the appointed *rendezvous* (*k*). On the same principle, a warranty to sail with convoy for the voyage, means that the ship shall sail with such a convoy as the government may appoint (*l*). Whether, therefore, the insured vessel proceed under relays of convoy from station to station (*m*), or the ships of war keep with her for a portion only of the voyage (*n*), the warranty is complied with.

The master must use his best exertion to sail and keep with the convoy; but if separated from it by stress of weather, the underwriter is not discharged (*o*). Where a vessel, after sailing with convoy, is driven back by an accident into her lading port, she may sail again on her voyage without waiting for the next convoy, or joining convoy from any other port (*p*). And if the convoy be dispersed by a storm, the master may run for his port of discharge (*q*).

Neglect to use all reasonable efforts to keep with the convoy,

that commanders of King's ships should take care of vessels under convoy. The 38 Geo. 3, c. 76, and 43 Geo. 3, c. 57, which are now repealed by 34 & 35 Vict. c. 116, and 36 & 36 Vict. c. 63, required all British ships to sail under convoy during hostilities. See *Long v. Dutt*, 2 B. & P. 209; *Cohen v. Hinckley*, 1 Taunt. 249; *Hinckley v. Walton*, 3 Taunt. 131.

(*g*) *Lilley v. Ewer*, Dougl. 72; see also *Jefferyes v. Legendra*, Show. 297; *S. C.* 3 Lev. 320; 2 Salk. 443.

(*h*) *Cohen v. Hinckley*, *ubi supra*. This was a decision on the Convoy Act, 43 Geo. 3, c. 57, but it is applicable to other cases.

(*i*) *Leithulier's Case*, 2 Salk. 443; *Bond v. Gonsales*, *ib.* 445; *Gordon v. Mor-*

ley; *Campbell v. Bordieu*, 2 Str. 1265.

(*k*) *Warwick v. Scott*, 4 Camp. 62.

(*l*) *Per* Lord Mansfield in *Smith v. Readshaw*, 2 Park on Ins. 610.

(*m*) *De Garey v. Clagget*, 2 Park on Ins. 511.

(*n*) *D'Eguino v. Bewicke*, 2 H. Bl. 552.

(*o*) *Jefferyes v. Legendra*, Show. 297. As to the duty of the master when under convoy, see also *supra*, pp. 137, 138.

(*p*) *Laing v. Glover*, 5 Taunt. 49. This was a decision on the Convoy Act, 43 Geo. 3, c. 57, but the principle of it applies to cases of warranty.

(*q*) *Audley v. Dutt*, 2 B. & P. 111; *Manning v. Gist*, 1 Marsh. on Ins. 373; *S. C.*, 3 Doug. 74.

is a breach of the warranty to sail with it. Thus, where signals from the convoy were neglected (*r*), and where a ship, after getting under weigh, waited for the master to come on board so long that she lost her place in the convoy (*s*), it was held that the underwriters were discharged. Further, in order to satisfy this warranty, the master of the insured vessel should obtain sailing orders from the officer in command of the convoy; for unless he does so, he is not in effect under the protection of the convoy (*t*). And it is his duty to use every exertion to obtain them before his ship leaves the *rendezvous* (*u*).

Where, however, the master is unable to obtain sailing orders owing to any misfortune, as where the weather is so bad that no boat can be sent for them (*x*), or he is prevented from obtaining them by circumstances over which he has no control, as by the refusal or neglect of the commander of the convoy to comply with his application (*y*), the underwriter is not discharged (*z*).

**Warranty of
neutrality.**

The warranty of neutrality occurs when the policy expressly warrants the neutrality of the ship or goods in general terms, or describes them as belonging to a particular neutral state. Property is neutral when it belongs to persons who are the subjects of a country which is at peace with both the belligerents, or who have by residence acquired the character of the subjects of such country for commercial purposes (*a*). In the latter class are comprised, not only all persons who have become domiciled in the country in question, but also all foreigners who reside there, even although they may have an *animus reverendi* (*b*). This warranty means, not only that at the commencement of the risk the property is neutral, but also that, so far as

(*r*) *Taylor v. Woodness*, 2 Park on Ins. 510.

(*s*) *Waltham v. Thompson*, 1 Marsh. on Ins. 381.

(*t*) See the judgments of Lord Mansfield in *Hibbert v. Pigou*, 2 Park on Ins. 500; and of Buller, J., in *Webb v. Thompson*, 1 B. & P. 6.

(*u*) See the judgment of Lord Eldon in *Anderson v. Pitcher*, 2 B. & P. 164; S. C., 3 Esp. 124.

(*x*) *Victorin v. Cleve*, 2 Str. 1250; see also *Magalhaens v. Busher*, 4 Camp. 54, and *Sanderson v. Busher*, *ib.* note, in which cases the undertaking to sail with convoy was contained in the bills of lading.

(*y*) *Verdon v. Wilmot*, 2 Park on Ins. 500, note.

(*z*) See the judgment of Butler, J., in *Webb v. Thompson*, 1 B. & P. 6.

(*a*) This subject will be found ably and fully treated of in 1 Arnold on Ins. 653 (2nd edit.). See also 1 Wheaton's International Law, 132; Phillimore's International Law, vol. 3, ch. ix., ed. 1873.

(*b*) *The Indian Chief*, 3 Rob. 12; *The Anna Catharina*, 4 Rob. 107; *The President*, 5 Rob. 277; *Tabbs v. Bonds-lack*, 4 Esp. 108; 3 B. & P. 207, note. See also *The Cargo ex Gerasimo*, 11 Moo. P. C. C. 88.

the acts of the assured are concerned, it shall continue to be so. Thus, if a ship warranted neutral forfeits her neutrality by the wilful act of either the master or the owner, the warranty is broken (c). If, however, the ship or cargo be neutral at the time when the voyage commences, the risk of future war is taken by the underwriter (d). So far, however, as relates to the acts of the assured, this warranty is continuous, whether the policy be a time or a voyage policy (e).

If the master violates a blockade, resists the right of search, or commits any other breach of neutral conduct, whereby the ship may be treated as an enemy, the warranty is broken (f).

It has been questioned whether a ship warranted to belong to a particular country, must not be owned and navigated according to the laws and treaties in force in that country (g). However this may be, it is clear that the mere fact of her belonging to such state will not suffice, but she must be completely documented as such a ship (h). If she be deficient in this respect during any portion of the voyage, the warranty is not satisfied (i).

In addition to the documents which ordinarily constitute a ship's papers, and which have been already enumerated (k), the master must also carry the flag and national papers of the country to which it is warranted that the ship belongs; for a vessel is considered to belong to the country under the pass and colours of which she sails (l).

One of the most usual proofs of a breach of the warranty of neutrality is a sentence of condemnation pronounced by a foreign Prize Court of competent jurisdiction, on the ground of an infraction of neutrality. It is now well settled that the sentence

Proof of
breach of.

(c) *Garrels v. Kensington*, 8 T. R. 230. This rule must be confined, however, to the acts of the assured or his agents; a policy on goods is not vitiated by a negligent omission on the part of the master of the vessel in which they are shipped, to procure proper papers. *Carruthers v. Gray*, 3 Camp. 142; 15 East, 35. See also *Dent v. Smith*, L. R., 4 Q. B. 414.

(d) *Eden v. Parkinson*, 2 Doug. 732; *Tyson v. Gurney*, 3 T. R. 477.

(e) See the judgment in *Sillem v. Thornton*, 3 E. & B. 883.

(f) *The Maria*, 1 Rob. 340; 1 Arnould on Ins. 669 (2nd edit.); Phillips on Ins. c. 9, s. 8, and the American cases cited there.

(g) *Baring v. Clagett*, 3 B. & P. 201.

(h) *Rich v. Parker*, 7 T. R. 705; *Barzillay v. Lewis*, 2 Park on Ins. 526; 3 Doug. 126; *Baring v. Clagett*, *ubi sup.*

(i) *Rich v. Parker*, *ubi supra*; see also *Bird v. Appleton*, 8 T. R. 562.

(k) *Ante*, pp. 139—143.

(l) *The Vigilantia*, 1 Rob. 13; *The Vrow Elizabeth*, 5 Rob. 2; *The Success*, 1 Dods. 131. This is, however, only a presumption which may be rebutted. See *R. v. Bjornsen*, 10 Cox, C. C. 74; 34 L. J., M. C. 180. See also *The Princess Charlotte*, Br. & L. 75. With respect to the cargo, it is, by the law of this country, otherwise. See *The Elizabeth* and *The Vreede Scholtys*, 5 Rob. 5, note.

Effect of sentence of Prize Court.

of such a Court, being an adjudication upon the status of the property, is conclusive as against all the world, as to every fact upon which the judgment of the Court proceeds, and which appears clearly on the face of the sentence (*m*); even although it may appear on the face of the sentence that the conclusion stated therein was arrived at by the adoption of rules of evidence which are peculiar to the country in which the ship was condemned (*n*).

But if the ground upon which the Court rests its adjudication, and declares the vessel to be a valid prize, is one which shows that, according to the law of nations, there has been, or may have been, no infraction of neutrality,—as, for instance, if it appear on the face of the sentence, either that the vessel *was* condemned, or that *it is doubtful whether she was not* condemned for the contravention of a regulation imposed, not by the law of nations, but by an arbitrary ordinance of the capturing power not assented to by the neutral state,—the sentence is not conclusive to prove the breach of warranty (*o*). The ground upon which the condemnation proceeds must appear on the face of the sentence to be free from doubt and ambiguity; if it is left in uncertainty, or can be collected by inference only (*p*), or if,

(*m*) See the judgment of Lord Ellenborough in *Bolton v. Gladstone*, 5 East, 160; *Baring v. Clagett*, *ubi supra*; *Lothian v. Henderson*, *ib.* 499; *Garreis v. Kensington*, 8 T. R. 230; the judgment of Tindal, C. J., in *Dalglish v. Hodgson*, 7 Bing. 504; and *Havelock v. Lockwood*, 8 T. R. 276; see also *ante*, p. 67, note (*a*). This subject is fully discussed in the notes to *The Duchess of Kingston's Case*, 2 Smith, L. C. 825, 7th ed.

(*n*) *Bolton v. Gladstone*, 2 Taunt. 85.

(*o*) *Bernardi v. Motteux*, 2 Doug. 574; *Pollard v. Bell*, 8 T. R. 434; *Bird v. Appleton*, *ib.* 562; *Price v. Bell*, 1 East, 663; *Siffken v. Lee*, 2 N. R. 484, and the judgment of Lord Alvanley in *Baring v. Clagett*, 3 B. & P. 201. It is necessary to recollect, in considering the effect of the sentences of foreign Courts of Prize as evidence of a breach of the warranty of neutrality, that there is a distinction between the conclusiveness of the judgment *as evidence of the facts which it asserts*, and its conclusiveness *as evidence of a breach of the warranty*. In many cases the sentence of a Prize Court may be conclusive as evidence

of the specific facts alleged in it, and yet those facts may not show any breach of the warranty. See also *Hobbs v. Hemming*, 17 C. B., N. S. 791; 34 L. J., P. C. 117; 36 L. J., C. P. 117, and *ante*, p. 67, note (*a*). Even if a foreign Court proceeding within its jurisdiction should come to an erroneous conclusion on the questions either of law or fact which are submitted to it, its judgment *in rem* can not be impeached in our Courts. To invalidate a foreign judgment *in rem* not contrary to natural justice, one of two points must be decided, either that the subject-matter was so situated as not to be within the lawful control of the State under the authority of which the Court sits, or that the sovereign authority of that State has not conferred on the Court jurisdiction to decide as to the disposition of the thing. *Castrique v. Imerie*, L. R., 4 H. L. 414; *Godard v. Gray*, L. R., 6 Q. B. 139; *Meyer v. Ralli*, 1 C. P. D. 358. See also *Rousillon v. Rousillon*, 14 Ch. D. 351.

(*p*) See the judgment of Lawrence, J., in *Calvert v. Bovill*, 7 T. R. 527; *Dalglish v. Hodgson*, 7 Bing. 504.

although the ship is declared "a good and valid prize," no specific ground is stated upon which the Court proceeded, the parties are not precluded from contesting the breach of warranty. The sentence of a Prize Court is moreover conclusive only as to the matter upon which it expressly decides; it is not so as to the premises which are stated in it as leading to the adjudication (*g*). If two grounds are stated in the sentence, upon either of which the Court may have proceeded, evidence will be admitted to show that the Court acted, in fact, upon one which was insufficient to warrant the condemnation (*r*).

Another express warranty which we have mentioned above, is that against confiscation or seizure of the ship in her port of discharge, or against capture or seizure generally. A warranty against confiscation by the government, in the ship's port of discharge, is not broken by the seizure of the vessel in that port by the forces of another state, although this be done with the permission of the local government (*s*).

Warranty of freedom from seizure in port of discharge, or capture.

The question which most frequently arises under this warranty is whether the ship was in port, or not, at the time of her seizure. This is a question of fact (*t*). The word "port" is not to be taken in its narrow or strict legal sense, but rather as meaning the place of discharge agreed upon by the assured and underwriters (*u*). A seizure in a roadstead, where vessels often partially unloaded before crossing a bar, was held to be a seizure in port within the meaning of this warranty (*x*). So, when a vessel was seized whilst anchored in the outer road of a bar harbour, at two miles distant from the point at which ships usually lay-to in order to discharge enough of their cargoes to enable them to pass the bar, it was held that she had arrived in her port of discharge within the meaning of the warranty (*y*). Where, however, a vessel was captured whilst anchored off the port, three miles without the roadstead within which ships were accustomed to unload in order to cross the bar into the inner harbour, it was held otherwise (*z*). This warranty is not broken

(*g*) *Christie v. Secretan*, 8 T. R. 192.

(*r*) *Bernardi v. Motteux*, 2 Doug. 574.

(*s*) *Levi v. Alnutt*, 15 East, 267.

(*t*) *Reynor v. Pearson*, 4 Taunt. 662.

(*u*) See the judgment of Lord Ellenborough in *Dalglish v. Brooke*, 15

East, 295; *Jarman v. Coape*, 2 Camp. 613; 13 East, 394.

(*x*) *Maydew v. Scott*, 3 Camp. 205 see also *Orme v. Taylor*, *ib.* 204.

(*y*) *Dalglish v. Brooke*, *ubi supra*.

(*z*) *Levy v. Vaughan*, 4 Taunt. 387.

where the capture occurs at a place neither within the actual port, nor within that part of the haven at which vessels unload (*a*); and a capture by a force issuing from the port of discharge (*b*), or on the high seas, or within the headlands of a river, where there is no port or place of unloading (*c*), is not within the warranty.

A warranty against "capture and seizure and the consequences of any attempt thereof," is not confined to legal capture or seizure; therefore where an English ship, insured by a policy which contained such a warranty, was fired into from a Russian fort and sunk, there being then no war between England and Russia, it was held that the underwriters were protected by the warranty (*d*). So, where coolie emigrants piratically ran away with the ship and stores, it was held that the underwriters of a policy on the stores were protected by a warranty against "capture or seizure" (*e*).

If the vessel insured under a policy containing a warranty against capture in port, goes to a port out of the course of her voyage in order to avoid capture in port; the underwriters are discharged (*f*).

Implied warranty in voyage policy that ship seaworthy.

The assured in effecting an insurance for a *voyage* is taken by law impliedly to warrant that the vessel shall be seaworthy at the commencement of the risk (*g*). Unless this were so the consequences would be very mischievous, for the effect of insurance would be to render those interested in the ship careless as to her condition, and as to the lives of the persons engaged in

(*a*) *Keyser v. Scott*, 4 Taunt. 660; see also *Whitwell v. Harrison*, 2 Ex. 127.

(*b*) *Mellish v. Staniforth*, 3 Taunt. 499; see also *Brown v. Tierney*, 1 Taunt. 517.

(*c*) *Baring v. Faux*, 2 Camp. 541.

(*d*) *Porcell v. Hyde*, 5 E. & B. 607. See also *Ionides v. The Universal Marine Insurance Company*, 14 C. B., N. S. 259, and *ante*, p. 483, note (*r*), as to what is a loss by a consequence of hostilities.

(*e*) *Kleinwort v. Shepherd*, 1 E. & E. 447.

(*f*) *O'Reilly v. The Royal Exchange Assurance Company*, 4 Camp. 246.

(*g*) See 1 Park. on Ins. 332—352, and the judgment of the Exchequer Chamber in *Small v. Gibson*, 18 Q. B. 156. See also *Gibson v. Small*, 4 H. of L. C.

353; and *Dudgeon v. Pembroke*, 2 App. Cas. 284. This implied warranty applies only to the commencement of the voyage, but if, during the voyage, the assured does any act voluntarily, by which the ship is made unseaworthy, and a loss thereby ensues, the underwriter is not liable. See the judgment in *Sillem v. Thornton*, 3 E. & B. 883. See also *Hollingsworth v. Brodrick*, 7 A. & E. 40. It does not extend to lighters by which the cargo is landed. *Lane v. Nixon*, L. R., 1 C. P. 412. The *onus probandi* that a vessel is unseaworthy lies on the underwriter. *Davidson v. Burnand*, L. R., 4 C. P. 117. See also *Pickup v. The Thames Insurance Company*, 3 Q. B. D. 594, *post*, p. 509, note (*p*).

navigating her (*m*). Such a warranty is implied, although the insurance is on salvage (*n*).

The warranty of seaworthiness in a voyage policy is, so far at least as the state of the ship and her equipment are concerned, confined to the commencement of the risk or of each stage of the risk. The risk commences at the port, when the insurance is "at and from" a particular port, and at the commencement of the voyage, when the insurance is "from" a given port (*o*). If the ship is seaworthy at this time, although she becomes otherwise immediately afterwards, the warranty is complied with (*p*); for the assured cannot know in what condition the vessel may be after leaving port (*q*).

At what period the warranty attaches.

Where the voyage out and home is insured, and the contract is an entire one, although the ship is to touch at several ports, the warranty is complied with if the ship be seaworthy when she first sails on the voyage, although she is not so on leaving the intermediate ports (*r*).

As in the case of all other warranties, the knowledge or ignorance of the assured with reference to the fact warranted is immaterial: therefore if the vessel was, in fact, unseaworthy at the commencement of the risk, the policy is avoided, notwithstanding the *bona fides* and honesty of the assured (*s*). As in other such cases, it is also immaterial to what cause the loss was attributable; for the warranty of seaworthiness, like every other warranty, is a *condition* on the non-performance of which the policy is void, whether the loss be occasioned by the unseaworthiness or by any other cause (*t*).

(*m*) See the judgment of Lord Redesdale in *Wilkie v. Geddes*, 3 Dow, 60.

(*n*) *Knill v. Hooper*, 2 H. & N. 277.

(*o*) See the judgment in *Small v. Gibson*, 16 Q. B. 156; *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, L. R., 3 P. C. 234; *Hollingworth v. Brodrick*, 7 A. & E. 40; and the cases cited *infra*, p. 511, note (*f*).

(*p*) See the judgment of Lord Eldon in *Watson v. Clark*, 1 Dow, 336, where it was said that if the inability of a ship to proceed on her voyage become evident shortly after her sailing, the presumption of law is that it arose from causes existing before she set sail, and that in such a case the burden of proof is shifted, and it rests with the assured to show that the inability arose from causes arising subsequently. This, however, is more properly a presumption

of fact, and to treat it when directing a jury as a presumption of law would be a misdirection. *Pickup v. The Thames Insurance Company*, 3 Q. B. D. 594. If the subsequent unseaworthiness arises immediately from the act of the assured himself, the underwriter will be discharged. See the cases cited *ante*, p. 482.

(*q*) See the judgment of Lord Mansfield in *The Earl of March v. Pigot*, 5 Burr. 2802.

(*r*) *Bermon v. Woodbridge*, 2 Doug. 781; see *ante*, p. 373, as to single and double voyages.

(*s*) *Lee v. Beach*, 1 Park on Ins. 342; *Oliver v. Cooley*, *ib.* 343; see also the judgment of Lord Eldon in *Douglas v. Scougall*, 4 Dow, 276.

(*t*) See the judgment of the Exchequer Chamber in *Small v. Gibson*, *ubi supra*.

What constitutes seaworthiness.

By seaworthiness is meant a fit state at the time of sailing as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured (*u*). The ship must, generally, be staunch, strong, of sound materials (*x*), and of a proper construction (*y*); nor may she be loaded with a greater cargo than she can safely carry (*z*). Where a deck cargo was insured, it was held that the warranty of seaworthiness was not complied with by proving that the ship could encounter ordinary rough weather with safety to herself, because the deck cargo could be readily jettisoned in case of need (*a*).

The ship's anchors and cables must be sufficient (*b*), and she must be properly equipped with sails and other stores (*c*). It is not always enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, since in time of war she must be able to keep up with convoy and avoid capture (*d*).

Seaworthiness relative to character of vessel and nature of voyage.

The warranty of seaworthiness is relative to the character of the vessel and nature of the voyage. If a vessel be insured "at

(*u*) See *per Parke, B.*, in *Dixon v. Sadler*, 5 M. & W. 414. Proof of this warranty is sometimes waived by an admission on the part of the underwriter that the ship is seaworthy. See *Parfitt v. Thompson*, 13 M. & W. 392; *Phillips v. Nairne*, 4 C. B. 343; *Dupont de Nemours v. Vance*, 19 How. (American), 162.

(*x*) *Douglas v. Scougall*, 4 Dow, 276; and see *ante*, pp. 73, 311.

(*y*) *Watt v. Morris*, 1 Dow, 32. In this case a vessel without knees was held to be unseaworthy for a foreign voyage.

(*z*) *Weir v. Aberdeen*, 2 B. & A. 320. It might be inferred from the expressions used in the judgment in this case that the policy is not avoided if an unseaworthiness existing at the commencement of the voyage is remedied before any actual loss occurs. But the facts of this case were peculiar, and the general rule is clearly otherwise. See *Forshaw v. Chabert*, 3 B. & B. 158; *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, L. R., 3 P. C. 234. And considering the nature of a warranty, it is difficult to see that, even in cases of unseaworthiness resulting only from mistake or accident, there can be any exception of this sort. See also *McLanahan v. The Universal Insurance Company*, 1 Peters (American) Rep. 170.

(*a*) *Daniels v. Harris*, L. R., 10 C. P. 1.

(*b*) *Wilkie v. Geddes*, 3 Dow, 57. Where one of the rules of an insurance club required that all chain cables should be tested, it was held that the testing of the cables was not a condition precedent, but only a direction to the committee as to what they were to point their attention to. *Harrison v. Douglas*, 3 A. & E. 396. But where one of the rules was, that unless certain stores were provided the ship should not be insured, it was held that the effect of a noncompliance with this provision was to render the ship unseaworthy. *Stewart v. Wilson*, 12 M. & W. 11. See also *supra*, p. 73. All anchors, in the case of British ships above a certain size, and all chain cables must now be tested and stamped. The Chain Cables and Anchors Act, 1874, 37 & 38 Vict. c. 51, s. 3 (Appendix, p. cccxxvii.)

(*c*) *Wedderburn v. Bell*, 1 Camp. 1. It would seem that, apart from any obligation to conform to any statutory regulations on the subject, a reasonably sufficient supply of medicine ought to be on board. See *Woolf v. Clagett*, 3 Esp. 257. The M. S. Act, 1867, contains provisions as to the medicines, &c., to be carried on British ships. See *supra*, p. 206.

(*d*) See the observations of Lord Ellenborough in *Wedderburn v. Bell*, *ubi supra*.

and from a port," she need not be, while in port, in a fit condition to go to sea. The warranty is complied with if while there she is in such a condition as to enable her to lie in reasonable security till she is properly repaired, or otherwise fitted out for the voyage (e). So, if the voyage be such as to require a different complement of men, or different state of equipment, in separate parts of it, as, if the voyage be down a canal or river, and thence in the open sea, it is enough if the vessel is, at the commencement of each stage of the navigation, properly manned and equipped for it (f). A vessel was built in this country for the purpose of navigating shallow rivers in India, and was insured for the voyage out. All means were used, by temporary appliances, to render her as fit as possible for the voyage; but, by reason of her construction, it was found impossible to render her absolutely fit for the ordinary perils of a sea voyage. The underwriters had full knowledge of the circumstances, and received an extra premium on account of the nature of the risk. Under these circumstances it was held, that the extent of the warranty of seaworthiness was relative to the capacity in this respect of the vessel insured, and therefore that it was satisfied by her being, at the commencement of the risk, as seaworthy as she could then be made (g).

The ship must be provided with a master of competent skill, acquainted with the navigation, and the ports for which she is bound (h). Where a captain had gone on board ill without taking any one who was competent to take charge of the ship, the jury were directed that if, in their opinion, considering the length of the voyage, and the circumstances under which it was undertaken, the ship was not sufficiently manned, they must find for the underwriters (i).

Competent
master.

(e) *Parmeter v. Cousins*, 2 Camp. 235; *Forbes v. Wilson*, 1 Park on Ins. 344, note; *Hibbert v. Martin*, *ib.*; *Smith v. Surridge*, 4 Esp. 25; *Annen v. Woodman*, 3 Taunt. 299.

(f) *Dixon v. Sadler*, 5 M. & W. 414; *Buccard v. Shepherd*, 14 Moore, P. C. C. 471; *Bouillon v. Lupton*, 15 C. B., N. S. 115; 33 L. J., O. P. 37; *The Quebec Marine Insurance Company v. The Commercial Bank of Canada*, L. R., 3 P. C. 234.

(g) *Burges v. Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17; *Clapham v. Langton*, 5 B. & S. 729; 34 L. J., Q. B. 46.

(h) *Tait v. Levi*, 14 East, 481; see also *ante*, p. 75.

(i) *Clifford v. Hunter*, Moo. & Malk.

103; *S. C.*, 3 C. & P. 16. The correctness of this ruling has been doubted in America. Mr. Chancellor Kent, in noticing it, remarks, that the warranty of seaworthiness "would seem to imply no more than that the assured must have a sound and well-equipped vessel with reference to the voyage, and have a competent person as master, a competent person as mate, and a competent crew as seamen." See 3 Kent Com. 287, note (a). It must be observed, however, that, in *Clifford v. Hunter*, the captain was ill when he went on board, and it may be doubted, looking at the peculiar circumstances of the case, whether Lord Tenterden meant to lay down the general proposition which

Competent
and sufficient
crew.

A competent and sufficiently numerous crew must be engaged for the voyage (*k*). But this warranty does not include an undertaking that the master or crew shall do their duty during the voyage. Their negligence or misconduct therefore is no breach of the warranty of seaworthiness (*l*). Where the master and crew negligently and improperly threw overboard ballast, whereby the vessel became unseaworthy, and was lost by a peril of the sea, it was held that the underwriters were liable (*m*). When a ship on a voyage from Cuba to Liverpool sailed with eight men for Liverpool and two for Jamaica, and touched at Jamaica to land the two men and procure others, it was held that she was not seaworthy for the whole voyage when she sailed, although it was impossible at Cuba to procure the proper complement of men for the voyage (*n*). A mere non-compliance with the provisions of the existing statutory enactments respecting the agreement with the crew does not, however, it would seem, constitute unseaworthiness (*o*). Where a whaler, which was insured with liberty to chase and capture prizes, had at the time of insurance lost some of her crew by death and casualties, so as to be unable to carry out all the purposes of her voyage, it was ruled at *Nisi Prius* that she might be deemed seaworthy, if she had a competent crew to pursue any part of her adventure and to navigate the vessel home (*p*).

Pilot.

The vessel must also usually be provided with a pilot of competent skill in those places where the nature of the navigation renders one necessary (*q*). On leaving a harbour abroad where there is an establishment of pilots, the duty of procuring one is clear (*r*). Where it is not practicable to procure one on entering port, it is sufficient, if due diligence to obtain one is used (*s*).

has been sometimes attributed to him. As to whether a British ship proceeding to sea without certificated officers and thereby infringing the M. S. Act, 1864, s. 136, would be "unseaworthy," see *Farmer v. Legg*, 7 T. R. 186, and the cases cited *supra*, p. 75, note (*r*).

(*k*) *Shore v. Bentall*, 7 B. & C. 798, note. And see the judgment of Lord Penzance in *Dudgeon v. Pembroke*, 2 App. Cas. 297.

(*l*) *Busk v. The Royal Exchange Insurance Company*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Holds-worth v. Wise*, 7 B. & C. 794; *Shore v. Bentall*, 7 B. & C. 798, note; *Bishop v. Pontland*, 7 B. & C. 219; *Dixon v. Sadler*, 5 M. & W. 405; *S. C.*, 8 M. & W. 895;

see also *Phillips v. Headlam*, 2 B. & Ad. 380.

(*m*) *Dixon v. Sadler*, *ubi supra*; see also *Redman v. Wilson*, 14 M. & W. 476.

(*n*) *Forshaw v. Chabert*, 3 B. & B. 158.

(*o*) *Redmond v. Smith*, 7 M. & G. 457.

(*p*) *Hucks v. Thornton*, Holt, 30.

(*q*) *Law v. Hollingsworth*, 7 T. R. 160. The principle on which this case is decided is correct, but as a decision on the particular facts it must be considered to be overruled. See the judgment in *Dixon v. Sadler*, 5 M. & W. 415; see also *ante*, p. 249.

(*r*) See the judgment of Lord Tenterden in *Phillips v. Headlam*, 2 B. & Ad. 382.

(*s*) *Phillips v. Headlam*, *ubi supra*.

Since *time policies* have become more common in this country the question has frequently arisen how far any warranty of seaworthiness is implied in them, and it has been contended that even if there be in these policies no such general warranty as exists in *voyage policies*, still that a warranty of seaworthiness at the commencement of the risk, so far as lies in the power of the assured to effect it, ought to be implied; so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy, even though a time policy, would not attach (s).

Absence of implied warranty in time policies that ship seaworthy.

It has now, however, been decided by the House of Lords that in a time policy there is no implied warranty of seaworthiness (t). It has also been held that there is no such warranty although the policy be effected on an outward bound ship lying in a British port at which the insuring owner resides (u). It was also held in the same case that a plea alleging that the assured had knowingly, wilfully and improperly sent the ship out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea, afforded no answer to the action, the declaration alleging that the loss had been caused by perils of the sea, and the plea containing no averment that the loss had been occa-

(s) See the judgment in *Small v. Gibson*, 16 Q. B. 160, 161, and the observations of Lord St. Leonards, Lord Campbell, Maule, J., and Martin, B., in *Gibson v. Small*, 4 H. of L. Cases, 353. Where at the time a time policy was made, and, unknown to the parties thereto, the ship, the subject of the insurance, had been injured, and partly in consequence afterwards went to pieces in a storm during the continuance of the risk, it was held that, in the absence of fraud, the policy attached, and the underwriters were liable. *Barker v. Janson*, L. R., 3 C. P. 303.

(t) *Gibson v. Small*, 4 H. of L. Cases, 353; *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581; 1 Q. B. D. 96; 2 App. Cas. 284, where the whole question of the implied warranty of seaworthiness as applicable to time policies was much considered. The application of the rule laid down in *Gibson v. Small* was by some members of the Court of Appeal limited. The decision of the House of Lords, however, distinctly set at rest all doubt upon the subject, affirming that in a time policy there is no warranty of seaworthiness, and that the

owner is disentitled to recover only if he knowingly and wilfully sends his ship to sea in an unseaworthy condition. In *Jenkins v. Heycock*, 8 Moore's P. C. C. 351, it was held that even if there were any warranty of seaworthiness in a time policy, such a warranty would not continue after the commencement of the voyage, but would be satisfied by the ship being seaworthy at the commencement of the risk. See also *Michael v. Tredwin*, 17 C. B. 551, the facts of which case came within the principle of *Gibson v. Small*. Since the decision of the cases above cited, it may be taken that a warranty of seaworthiness is in no case implied in a time policy. See also *Hollingworth v. Brodbeck*, 7 A. & E. 40. It appears that the expression "good," which is used in these and other policies in describing the ship, is a merely commendatory expression, and that no warranty is to be implied from its use. See the judgment in *Gibson v. Small*, cited above.

(u) *Thompson v. Hopper*, 6 E. & B. 172, dissentiente Erle, J. See also *Faucus v. Sarafeld*, *ib.* 192.

sioned by the unseaworthiness (*v*). A plea containing the same allegations, and further averring that the assured "wrongfully and improperly caused and permitted the ship to be and remain on the high seas, near to the sea shore, for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on her said voyage, during which time the ship, by reason of the premises, was wrecked," was held to be good; since it showed that the loss had resulted from the wrongful acts of the assured, although the perils of the sea might be the proximate cause of it (*v*): but the jury having found that the immediate cause of the loss was not the unseaworthiness, it was held that the underwriter was liable; and further, that the judge acted correctly in not leaving to the jury any question upon evidence which was adduced to show that although the unseaworthiness was not the immediate cause of the loss, still the loss would not have occurred if the ship had been seaworthy when she went to sea (*x*).

Even the absence of a warranty of seaworthiness, the underwriter is not responsible in any case for loss or damage arising solely by reason of the shipowner having knowingly sent the ship to sea in an unseaworthy state (*y*).

Absence of implied warranties of ownership of ship or fitness of goods.

There is no implied warranty in a voyage policy of the ownership of a vessel on which a cargo is shipped, so that a change of ownership and even nationality will not vitiate the policy (*z*).

In the case of a policy on goods, there is no implied warranty that they should be in a fit state to be shipped (*a*).

REPRESENTATIONS.

A representation, as the term is used in insurance law, means a statement either verbal or in writing, made by the assured to the underwriter of some circumstance connected with the proposed risk, and which statement is either not embodied in the written contract of insurance at all, or, if inserted in it, is not

(*v*) *Thompson v. Hopper*, 6 E. & B. 172, dissentiente Erle J.

(*z*) *Thompson v. Hopper*, E., B. & E. 1038, in Cam. Scacc., reversing *Thompson v. Hopper*, 6 E. & B. 937.

(*y*) *Fawcus v. Sarsfield*, 6 E. & B. 192; *Thompson v. Hopper*, 6 E. & B. 172; 1 E., B. & E. 1038; *The Merchant Trading Company v. The Universal Marine Company*, not reported, but

cited in *Dudgeon v. Pembroke*, L. R., 9 Q. B. 596; *Dudgeon v. Pembroke*, 1 Q. B. D. 115; 2 App. Cas. 277; and *The West India Telegraph Company v. The Home and Colonial Insurance Company*, 6 Q. B. 51. See also *supra*, p. 482.

(*a*) *Dent v. Smith*, L. R., 4 Q. B. 414.

(*a*) *Koebel v. Saunders*, 17 C. B., N. S. 71; 33 L. J., C. P. 310.

intended to be of its essence, and consequently need not be literally and strictly complied with (*b*). Representations differ from warranties, inasmuch as the latter are, as we have seen, integral parts of the contract; they are not, like representations, collateral to it, but amount to conditions which must be strictly complied with, and on the non-performance of which the contract is void (*c*). How they differ from warranties.

Representations either amount to direct assertions by the assured as to the past, present, or future existence of particular facts, or to statements by him of his information, expectation, or belief as to such facts. Different kinds of representation

Representations, to be binding, must also be made when the policy is effected (*d*), or during the negotiation for it (*e*).

Representations are admissible to add to or to explain the policy, but not to contradict it. Thus, where the policy reserved leave to "touch at" the Cape de Verd Islands, a letter showing that the intention was to permit the ship to take in salt there, and which had been communicated to the underwriters, was admitted (*f*). On the other hand, in an action on a policy "at and from London to Berbice," it was held that it could not be shown that the risk was to commence at sea, although a letter was produced by the broker to the underwriter when the policy was effected, by which it appeared that the ship was out of the course from London to Berbice, and the words "at sea" were thereupon inserted in another part of the policy (*g*). A representation cannot, however, be objected to because it supersedes an usage or an implied warranty (*h*). When admissible in evidence.

A representation to the first underwriter is considered as repeated to all subsequent underwriters, since the latter are supposed to rely to some extent upon the skill and discretion of the Effect of when made to first underwriter.

(*b*) See *Pawson v. Watson*, 2 Cowp. 785, the cases cited below, and the judgment in *Behn v. Burness*, in Cam. Scacc., 32 L. J., Q. B. 204, cited *ante*, p. 307, note (*d*). The following is an instance of a statement which, although occurring in the policy, was held from its nature to amount only to a representation. Where the policy contained the words "to return 10*l*. per cent. for convoy and arrival," these words were held to be only a representation, and not a warranty that the ship would

sail with convoy. *Reid v. Harvey*, 4 Dow, 97; see also *Hodgson v. Richardson*, 1 W. Bl. 463; *Thompson v. Buchanan*, 4 Brown, P. C. 484.

(*c*) *Ante*, p. 499.

(*d*) *Dawson v. Atty*, 7 East. 367.

(*e*) *Edward v. Footner*, 1 Camp. 630.

(*f*) *Urquhart v. Barnard*, 1 Taunt. 450.

(*g*) *Redman v. London*, 3 Camp. 503; *S. C.*, 5 Taunt. 462.

(*h*) *Duer on Ins.*, Lect. 14, sects. 17 and 18.

first (i). So, if the first signature is fraudulent, and merely colourable in order to induce others to underwrite, the policy is avoided (k). This rule is, however, strictly confined to representations made to the first underwriter. Representations made to intermediate underwriters are not considered to be made to those who follow (l); nor does the rule apply to the underwriters of a separate policy (m).

Effect of fraud.

Where there is actual or *moral* fraud in a material representation the contract is rendered voidable upon the general principles applicable to ordinary contracts. But the contract of insurance being one *uberrimæ fidei*, it is settled that if a representation material to the risk is substantially untrue, the policy is thereby rendered voidable, at the election of the underwriter, even although the misrepresentation is not fraudulent in the ordinary sense of the word, that is to say, not untrue within the knowledge of the party making it (n). Under a plea in an

(i) *Barber v. Fletcher*, 1 Doug. 305; and see *Pawson v. Watson*, 2 Cowp. 788. In *Forrester v. Pigou*, 1 M. & S. 13, Lord Ellenborough stated that he thought this proposition must be received with great qualification. In *Pawson v. Watson*, Lord Mansfield appears to have held that the rule applied to statements relating immediately to the risk, such as assertions as to whether the ship is or is not missing, but not to collateral undertakings relating to such matters as the number of guns the ship is to carry. See Duer on Ins., Lect. 14, note 11. Nor does the rule apply where the communication to the first underwriter is of a fact which *increases* the risk, and is therefore made for the benefit of the underwriter.

(k) *Wilson v. Duckett*, 2 Burr. 1361; see also *Whittingham v. Thornburgh*, 2 Vern. 206, and *Sibbald v. Hill*, 2 Dow, 263. In these cases the first underwriter is called "a decoy duck." The continental writers call him "a dolphin" who leaps that others may follow. See Duer on Ins., Lect. 14, s. 23, note (b).

(l) *Bell v. Carstairs*, 2 Camp. 543; *Brine v. Featherstone*, 4 Taunt. 869; see also *Marsden v. Reid*, 3 East, 572.

(m) Duer on Ins., Lect. 14, s. 21.

(n) *Macdowall v. Fraser*, 1 Doug. 260; *Fitzherbert v. Mather*, 1 T. R. 12; *Feiss v. Parkinson*, 4 Taunt. 640; *Holland v. Russell*, 1 B. & S. 424; *S. C.* in Cam. Scacc., 4 B. & S. 14. See also *Urquhart v. Macpherson*, 3 App. Cas. 831. In the earlier cases misrepresentations were

held to avoid the policy only when they were actually and *morally* fraudulent, that is, untrue in fact, and either known to be untrue by those who made the assertion, or not known by them to be true. It was also held that representations formed no part of the contract. See the judgment of Lord Mansfield in *Pawson v. Watson*, 2 Cowp. 788. In the later cases it is still said that a representation is no part of the contract, but it is held that, even where the fraud is constructive or *legal* only, as, for instance, where the assured has no intention to deceive the underwriter, but innocently misleads him on a material point, this is sufficient to invalidate the policy. See *Feiss v. Parkinson*, and *Fitzherbert v. Mather*, *ubi supra*; also *Dennistoun v. Lilley*, 3 Bligh, 202, and the judgment of Willes, J., in *Anderson v. The Pacific Fire and Marine Insurance Company*, L. R., 7 C. P. 65. Mr. Duer, the American writer, in his work on Insurance, objects to this view, alleging that the true reason why a misrepresentation vitiates a contract is, because it is not merely a collateral statement, but a substantive part of the contract, and that the English authorities have adopted the other view only in order to avoid a violation of the rule that a written instrument cannot be varied by parol statements. See Duer on Ins., Lect. 14, s. 5. It will be seen, however, from the above statement, that the same end is arrived at whichever view is adopted, so that the question is of no

action on a policy alleging a representation to have been false to the knowledge of the assured, a concealment or representation, not fraudulent in the ordinary sense, may be shown (o).

Representations which relate to material facts must be complied with. The following are instances of representations, the substantial non-compliance with which has been held to avoid the policy. A representation that the ship was safe on a particular day (p), that she belonged to a neutral state (q); that she was furnished with a necessary trading licence (r); that she would sail on a given day (s); that she was to carry a particular armament (t); and in the case of a policy on goods that the ship was a new ship (u). But a substantial compliance with a material representation is sufficient (v).

How far they must be complied with.

Where the assured asserted that his vessel "mounted twelve guns and twenty men," and the ship sailed with less than this number of men and guns, but carried in addition a number of boys and several swivels which made her force in fact greater than if she had been equipped with the twelve guns and twenty men, it was held that this being a representation and not a warranty, and having been substantially complied with the underwriters were liable (x).

Where freight advanced was insured on a ship and goods "lost or not lost from Monte Video to Havre," the greater part of the

practical moment. If a system of law had to be formed *de novo*, the American view might perhaps be thought, in theory, more logical than ours; but there is no inconsistency in the view taken by our Courts; the only difficulty is to determine what is included within the expression "fraud." Some of our most eminent jurists have considered that *legal* without *moral* fraud invalidates a contract; see the judgment of Lord Abinger in *Cornfoot v. Fowke*, 6 M. & W. 377, and the cases collected in 2 Smith, L. C. 87 (8th edit.); whilst others have held that in order to vitiate ordinary contracts there must be actual or *moral* fraud. See the judgment of Parke, B., in *Cornfoot v. Fowke*, and 2 Smith, L. C., *ubi supra*. Even these latter, however, allow that in cases of insurance a misrepresentation of material facts is equivalent to fraud. See the observations of Parke, B., in *Moens v. Heyworth*, 10 M. & W. 157, and in *Elkin v. Janson*, 13 M. & W. 662. It is now well settled, however, that in order to invalidate contracts, other than con-

tracts of insurance by reason of any untrue representation, *moral* fraud must be proved. See *Shrewsbury v. Blount*, 2 M. & Gr. 475; *Ormrod v. Huth*, 14 M. & W. 651; *Evans v. Collins*, 5 Q. B. 804; *Rawlings v. Bell*, 1 C. B. 951; *Thom v. Bigland*, 8 Ex. 725; *The North British Insurance Company v. Lloyd*, 10 Ex. 523, and *Childers v. Wooler*, 2 E. & E. 287. See also *The Rees River Mining Company v. Smith*, L. R., 4 H. L. 79; *Alderson v. Madisson*, 5 Ex. D. 296.

(o) *Anderson v. Thornton*, 8 Exch. 425.

(p) *M'Dowall v. Fraser*, 1 Doug. 260.

(q) *Steel v. Lacy*, 3 Taunt. 285.

(r) *Feiss v. Parkinson*, 4 Taunt. 640.

(s) *Dennistoun v. Lillie*, 3 Bligh. 202.

(t) *Edwards v. Footner*, 1 Camp. 530.

(u) *Ionides v. The Pacific Fire and Marine Insurance Co.*, L. R., 6 Q. B. 676.

(v) See *per* Lord Mansfield in *De Hahn v. Hartley*, 1 T. R. 345; see also *Van Tungeln v. Dubois*, 2 Camp. 151.

(x) *Pawson v. Watson*, 2 Cowp. 785.

cargo having been shipped at Santa Cruz and not at Monte Video, it was held that there was no misdescription of the interest of the assured (y).

The meaning of representations may sometimes be extended by implication beyond their express words. Thus, where a ship was represented to be American, the Court held that this implied that she was documented as such (z). And where the insurance was on ship "at and from Genoa, the adventure to begin from the loading to equip for this voyage," it was held that these words implied that Genoa was the port of loading (a).

Where the goods were insured from Lisbon to the Clyde at a premium of ten per cent., "to return five per cent. for convoy and arrival," it was held that the alternative of the vessel's sailing with convoy, which was implied by these words, was a material representation, and that as at the time it was made the assured knew that in fact the vessel had sailed without convoy the policy was avoided (b).

Where a representation was made at the time of effecting the policy as to the order in which the ship would proceed to certain places on the voyage insured, and this representation was true at the time when it was made, that is to say, it was then intended that she should sail in that course, it was held that a non-compliance with the representation, owing to a circumstance over which the assured had no control, namely, the refusal of the crew to pursue the voyage in the order mentioned from a fear of pirates, did not discharge the underwriters (c).

Effect of
representa-
tions respect-
ing future
events.

Representations respecting future events do not differ in principle from those which relate to past or present facts (d); nor do they, if positive, differ from them in effect. In practice, however, representations of the former class are more often construed as referring to the mere expectation or belief of the party making them, especially if they relate to events over which he has no control. Thus, where the owner of goods made a representation as to the time when the vessel containing them would sail, this was held to be merely a representation as to his expectation on

(y) *Ellis v. Lafone*, 8 Ex. 546.

(z) *Steel v. Lacy*, 3 Taunt. 285.

(a) *Hodgson v. Richardson*, 1 W. Bl. 463; see also *Kirby v. Smith*, 1 B. & A. 672; *Ratcliffe v. Shoolbred*, 1 Park on Ins. 290.

(b) *Reid v. Harvey*, 4 Dow, 97.

(c) *Driscoll v. Passmore*, 1 B. & P.

200.

(d) In *Flinn v. Tobin*, Moo. & Malk. 367, Lord Tenterden appears to have drawn a distinction between a representation of a present fact and one which applied to future events. See, however, *Flinn v. Headlam*, 9 B. & C. 693.

the subject (*f*). Where, however the agents of the shipowners sent to them a letter stating that the ship would sail on the 1st of May, and they showed this letter to the underwriters on the ship and goods as the advice of the agents, it was held that this expression was positive, and not the statement of an expectation only, and the ship having sailed on an earlier day, that the underwriters were not liable (*g*).

Where the assured states merely his own intention, expectation, information or belief, in regard to a fact or event, the policy will not be avoided by reason of the mere untruth of the facts referred to, if the intention, expectation, or belief really existed in the mind of the assured, or the information alleged to have been received by him had in fact been so received (*h*).

Whether a representation be material or not depends upon the surrounding circumstances, and must be decided by the jury upon the facts of the particular case (*i*). The materiality of a representation, as affecting the contract, does not, strictly speaking, depend upon its actual materiality as affecting the risk, but upon the influence produced by it upon the mind of the underwriter. Thus, on the one hand, a misrepresentation, however material to the estimation of the risk insured, will not vitiate the policy unless the underwriter accepted the insurance upon the faith of it (*k*); whilst on the other, a statement which has no real bearing upon the risk insured against, but which, nevertheless, influences the mind of the underwriter, as, for instance, an assertion that previous insurances have been obtained on the same ship at a low premium, will, if untrue, avoid the policy (*l*).

In what cases representations are material.

The subject of *concealment* is closely connected with that of representation. A person about to insure is bound to communicate to the underwriter every fact within his knowledge which is either really material to the risk insured, or which is likely to affect the taking of the risk by an underwriter, governing himself by the principles and calculations on which underwriters in practice act, or the amount of the premium to be required by

CONCEALMENT.
What must be communicated.

(*f*) *Bowden v. Vaughan*, 10 East, 415.

(*g*) *Dennistoun v. Lillie*, 3 Bligh, 212; see also *Chaurand v. Angerstein*, Peake, 44.

(*h*) *Barber v. Fletcher*, 1 Doug. 306; 1 Arnould on Ins. 558 (2nd edit.); and see *Anderson v. The Pacific Fire and Marine Insurance Co.*, L. R., 7 C. P. 65.

(*i*) See the judgment of Lord Ellenborough in *Bridges v. Hunter*, 1 M. & S. 19, and *Elton v. Larkins*, 8 Bing. 198; see also *Gandy v. The Adelaide Marine Insurance Co.*, L. R., 6 Q. B. 746.

(*k*) *Flinn v. Headlam*, 9 B. & C. 693.

(*l*) *Sibbald v. Hill*, 2 Dow, 263.

him (m). And it must be recollected that in all cases of concealment the fact that the information is innocently withheld is unimportant, if it relate to a matter really material to the risk, or which would have affected the terms upon which the underwriter would have consented to insure had he known the truth (n).

Relating to
the ship or
voyage in-
sured.

It is the duty of the assured to communicate to the underwriter all the material information which he possesses relating to the ship or the voyage insured. For instance, if he knows or has heard a report as to the time when an overdue ship sailed (o), or if he has news that the ship has been lost or damaged (p), or that she has been seen in a leaky or dangerous condition (q), or that she was seen at sea without convoy (r), or in danger of capture (s),

(m) *Ionides v. Pender*, L. R., 9 Q. B. 531; *Stribley v. The Imperial Marine Insurance Co.*, 1 Q. B. D. 507; *Rivaz v. Gerusi* (C. A.), 6 Q. B. D. 222; *Hutchison v. The Aberdeen Sea Insurance Company*, 3 Sess. Ca. 4th series, 682; *Carter v. Boehm*, 3 Burr. 1905; *Shirley v. Wilkinson*, 1 Doug. 306, note; *Thompson v. Buchanan*, 4 Brown, P. C. 482; *Fitzherbert v. Mather*, 1 T. R. 12; *Russell v. Thornton*, 4 H. & N. 788; *S. C.*, Cam. Scacc., 6 H. & N. 140; *Holland v. Russell*, 1 B. & S. 424; *S. C.* in Cam. Scacc., 4 B. & S. 14; and *Foley v. Tabor*, 2 F. & F. 663. In *Elton v. Larkins*, 5 C. & P. 392, Tindal, C. J., said, "A material concealment is a concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium." See also the judgment of Cockburn, C. J., in *Bates v. Hewitt*, L. R., 2 Q. B. 595. It was held in that case that the ship having formerly been a cruiser in the Confederate Service was a material fact and one which the insurer was bound to communicate, although the underwriter had from his previous knowledge means of identifying the ship. See also *Harrouer v. Hutchinson*, L. R., 5 Q. B. 584. This rule respecting concealment is peculiar to the contract of insurance; it is not applicable to the case of a guarantee. *Hamilton v. Watson*, 12 C. & F. 109; *The North British Insurance Company v. Lloyd*, 10 Ex. 523. It is applicable to life and fire policies as well as marine policies. *Bufe v. Turner*, 6 Taunt. 337; *Lindenau v. Desborough*, 8 B. & C. 586. Where a material fact was concealed from the underwriters at the

time of initialing the slip, but before delivery of the policy it was communicated to them, it was held that they were not bound to elect, whether they would be bound by the policy or not; but that when a loss occurred they might rescind. *Morrison v. The Universal Marine Insurance Company*, L. R., 8 Ex. 197, Cam. Scacc., reversing the judgment of Court below; see *ib.* p. 40. But facts coming to the knowledge of the assured after the slip has been initialed, need not be communicated to the underwriter. *Cory v. Patten*, L. R., 7 Q. B. 304; affirmed L. R., 9 Q. B. 577.

(n) See *Stribley v. The Imperial Marine Insurance Co.*, 1 Q. B. D. 507, and the cases cited in the previous note.

(o) *Willes v. Glover*, 1 N. R. 14; *Bridges v. Hunter*, 1 M. & S. 15; *Webster v. Foster*, 1 Esp. 407; *Elton v. Larkins*, 5 C. & P. 392; *Mackintosh v. Marshall*, 11 M. & W. 116; see also *Elkin v. Jansen*, 13 M. & W. 655. Where the ship is not overdue or missing, and there is no other circumstance which makes the time of her sailing material to the risk, it need not be communicated. See *Foley v. Molins*, 5 Taunt. 530; *Fort v. Lee*, 3 Taunt. 381; and *per* Tindal, C. J., in *Elton v. Larkins*, *ubi supra*.

(p) *Fitzherbert v. Mather*, 1 T. R. 12. *Gladstone v. King*, 1 M. & S. 35; *Stribley v. The Imperial Marine Insurance Company*, *ubi supra*.

(q) *De Costa v. Scandret*, 2 P. Wms. 170; *Lynch v. Hamilton*, 3 Taunt. 37; *Lynch v. Dunsford*, 14 East, 494.

(r) *Sawtell v. Loudon*, 5 Taunt. 359.

(s) *Durrell v. Bederley*, Holt, 283; *Beckwaite v. Nalgrove*, cited 3 Taunt. 41; *Hobbs v. Henning*, 34 L. J., C. P.

or that a vessel which sailed at the same time as, or subsequent to, the ship insured, has arrived before her (*t*), he must communicate each of these facts to the underwriter.

The assured is not excused from communicating material information merely because he has received no regular or authentic advice but only a doubtful account (*u*), or because his information is in the form of a general rumour (*x*); for the underwriter is entitled to the exercise of his own discretion as to the value of such reports.

Where goods were insured at a value greatly over their real value, and it was proved, that, in practice, underwriters, where the valuation is excessive, consider the risk speculative, and either decline it or ask a higher premium, it was held that the question of over valuation, and the materiality of its non-disclosure, were properly left to the jury (*y*).

Where a vessel insured sailed from Elsineur for Hull, and six hours afterwards her owner followed in another ship, and met with rough weather, but when he reached Hull his vessel had not arrived, it was held that he was bound to communicate these facts to the underwriter (*z*). So, where two ships left Malaga for London about the same time, and when the owner of one of them insured her it was known at Lloyd's that the other ship had arrived three days before, but the insurer also knew that the vessels had met and parted company off Oporto in a gale of wind, and did not communicate this to the underwriters, it was held that this concealment avoided the policy (*a*).

A merchant resident at Sydney shipped goods for England on board a ship, and by another vessel, which sailed after her, wrote to an agent in England, and desired him, if he received the letter before the ship carrying the goods arrived, to wait for thirty days, in order to give her every chance of arrival, and then to effect an insurance on the goods. The agent, after waiting more than thirty days, employed a broker to effect the insurance, and handed to him the letter. The broker told the underwriters the

117. Where a vessel which had been insured by underwriters as a British ship had been subsequently transferred to a foreign flag by means of a fictitious sale, and after such transfer had been insured with some of the underwriters who had before insured her, it was held that a failure to mention the change of nationality avoided the policy. *Hutchison v. The Aberdeen Sea Insurance Company*, 3 Sess. Ca. 4th series, 682.

(*t*) *McAndrew v. Bell*, 1 Esp. 372.

(*u*) *De Costa v. Scandret*, 2 P. Wms. 170.

(*x*) *Durrell v. Bederley*, Holt, 283; *Lynch v. Hamilton*, 3 Taunt. 37. See *Leigh v. Adams*, 25 L. T. 566.

(*y*) *Ionides v. Pender*, L. R., 9 Q. B. 531. See also *Rivaz v. Gerussi*, 6 Q. B. D. 222.

(*z*) *Kirby v. Smith*, 1 B. & A. 672.

(*a*) *Westbury v. Aberdeen*, 2 M. & W. 267.

date of the sailing of the ship that carried the goods, and also the date of the letter, but he did not mention when the letter was received, or the order to wait thirty days after the receipt of it, before effecting any insurance. Two vessels which had left Sydney after the ship which carried the letter, arrived in England shortly before the policy was effected. The Court expressed a strong opinion that a jury would be bound to hold that the letter was material, and, therefore, that the concealment of its contents avoided the policy. They also thought, that as the underwriter might naturally have supposed that the letter came by one of the two ships which had arrived shortly before the policy was made, the time when it was received was a material fact which should have been communicated to him (b).

What need
not be com-
municated.

The assured is, however, only bound to communicate those facts which lie peculiarly within his knowledge. He is not bound to mention general topics of speculation, the knowledge of which may fairly be supposed to be common to both parties; thus, he is not bound to mention to the underwriter the causes natural or political which may render the voyage dangerous; such, for instance, as the probabilities of bad weather, the difficulties of the particular voyage, the chances of war, or the like; for with respect to matters of this kind, different men argue differently, and the means of information are open to both the contracting parties (c). So the underwriters are bound to know any general usage which affects the employment of ships in any particular trade (d); but not an usage which is not universal, but only occasional (e).

Usage of
trade.

Contents of
Lloyd's lists.

The assured is, moreover, not bound to inform the underwriter of facts which the latter may by inquiry and due diligence learn from the ordinary sources of information. Thus, where the shipping lists at Lloyd's were in the hands of the underwriters, it was held, in an old case, that the assured was not bound to disclose to them material facts mentioned in those lists (f). But it has been decided that the same effect is not

(b) *Rickards v. Murdock*, 10 B. & C. 527. As to the reception of evidence in this case, see *post*, p. 524.

(c) See the judgment of Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1910; see also *Planché v. Fletcher*, 1 Doug. 251.

(d) *Fallace v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, *ib.* 505, note; *Kingston v. Knibbs*, *ib.* 508, note; *Moxon v.*

Atkins, 3 Camp. 200; *Da Costa v. Edmunds*, 4 Camp. 142; *Stewart v. Bell*, 5 B. & A. 238; see also the cases cited *ante*, p. 294.

(e) *Tennant v. Henderson*, 1 Dow. 324.

(f) *Friers v. Woodhouse*, Holt, 572. Where, however, the assured is guilty of a misrepresentation or concealment inconsistent with the lists, he cannot excuse himself by reason of the pre-

to be given to a list in a foreign language, which had been sent to Lloyd's and was hung up only in the *inner room* there. And it would seem that it cannot be assumed as a matter of law that an underwriter, subscribing to the Shipping Gazette, called *Lloyd's List*, is affected with knowledge of the entries therein contained relating to any particular ship (*g*). Nor is the assured bound to inform the underwriters of all the bygone calamities which the ship may have met with, if they do not affect her then condition (*h*). And it is a general rule that the assured is only bound to communicate facts. He is not bound to disclose to the underwriter any information he may have received as to the sensations or apprehensions produced in the minds of others by those facts (*i*).

Concealment of material facts coming to the knowledge of the assured after a slip is initialed, but before the policy is executed, will not vitiate the insurance (*j*).

The assured is presumed to know facts which are known to his agent. If, therefore, material facts are improperly concealed by the agent from the shipowner, and by him innocently and necessarily not communicated to the underwriter, the policy is still avoided (*k*). Where, however, a captain innocently neglects to communicate that the vessel has been damaged, the policy is not avoided, but the damage must be treated as an implied exception from the policy (*l*).

Concealment
by agent.

sumed knowledge of the underwriter. *Mackintosh v. Marshall*, 11 M. & W. 116. See also *Bates v. Hewitt*, L. R., 2 Q. B. 595, *ante*, p. 520, n. (*m*). In *Gandy v. The Adelaide Insurance Company*, L. R., 6 Q. B. 746, the question was put to the jury whether the fact that the assured had resolved not to continue the ship in her class, which at the time of the insurance was A 1 on Lloyd's Register was a material fact. This question was answered in the negative, and on appeal it was, after discussing and distinguishing *Bates v. Hewitt*, *ubi supra*, held that the question could not have been withdrawn from the jury, and that there had been no misdirection.

(*g*) *Elton v. Larkins*, 5 C. & P. 85; 8 Bing. 198.

(*j*) *Morrison v. The Universal Marine Insurance Company*, L. R., 8 Ex. 40.

(*h*) *Freeland v. Glover*, 6 Esp. 14; 7 East, 457. In this case a letter had been shown to the underwriters which

referred to, although it did not mention the contents of, the earlier letter, which it was contended ought to have been communicated; and the Court observed, that the underwriters might have asked to see the earlier letter if they had thought it material.

(*i*) *Bell v. Bell*, 2 Camp. 475.

(*j*) *Cory v. Patton*, L. R., 7 Q. B. 304; *Lishman v. The Northern Marine Insurance Company*, L. R., 8 C. P. 216; 10 C. P. 179.

(*k*) *Fitzherbert v. Mather*, 1 T. R. 12; *Anderson v. Thornton*, 8 Ex. 425; *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511. In this case it was held that the assured could not recover if his agent had failed to communicate by telegraph a material fact where it was in the ordinary course of the agent's business to do so, and that mode of communication was in general use.

(*l*) *Gladstone v. King*, 1 M. & S. 35; *Stribley v. The Imperial Marine Insurance Company*, L. R., 1 Q. B. D. 507.

Materiality,
how judged
of.

The materiality of the fact concealed depends, as in cases of misrepresentation (*m*), upon the effect it is calculated to produce on the mind of the underwriter. If, therefore, the information withheld would have induced the underwriter to decline the insurance, or to charge a higher premium, its concealment is fatal to the policy, although it may afterwards appear that it was untrue, or the loss may arise from a cause totally distinct from the subject-matter of the concealment. Thus, where the assured failed to communicate to the underwriter the intelligence which he had received, that his ship had been seen deep laden and leaky, the concealment was held to vitiate the insurance, although the news was false, and the loss arose not from the supposed perils, but from a capture (*n*). The question always is, whether, looking at all the circumstances at the time the policy was underwritten, there was a concealment either fraudulent, that is designed, or, though not designed, varying materially the object of the policy, and changing the risk *understood* to be run (*o*).

How far the
opinion of
underwriters
is evidence.

The question whether, in actions on policies, brokers or other skilled witnesses can be called to speak to the materiality of any information which is withheld by the assured, has given rise to considerable discussion and to much difference of opinion. In some cases such evidence has been admitted upon the same principle as that upon which the testimony of persons skilled in particular sciences, or conversant with the practice of particular trades, is receivable (*p*); in other it has been rejected, upon the ground that the question is one of opinion merely, and not of scientific knowledge, and that to admit such evidence would be to place the witnesses in the position of the jury (*q*).

Probably the true rule is, that the admissibility of such evidence depends upon the facts of each particular case; and that

(*m*) *Ante*, p. 519.

(*n*) *Lynch v. Hamilton*, 3 Taunt. 37; see also *Lynch v. Dunsford*, 14 East, 494; *Seaman v. Fonereau*, 2 Str. 1183.

(*o*) See the judgment of Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1911; *Harrover v. Hutchinson*, L. R., 5 Q. B. 584.

(*p*) *Berthon v. Loughman*, 2 Stark. 258; *Chaurand v. Angerstein*, Peake, 43; *Littledale v. Dixon*, 1 N. R. 151; *Hayward v. Rodgers*, 4 East, 590; *Rickards v. Murdock*, 10 B. & C. 527; *Chap-*

man v. Wallon, 10 Bing. 57. This is the view which appears to have been adopted in America. See Duer on Ins., Lect. 14, ss. 26 and 27, and the judgment of Story, J., in *McLanahan v. The Universal Insurance Company*, 1 Peters (American) Rep. 188; see also 1 Arnould on Ins. 620 (2nd edit.).

(*q*) *Carter v. Boehm*, 3 Burr. 1905; *Durrell v. Bederley*, Holt, 283; *Campbell v. Rickards*, 5 B. & Ad. 840. See also Phillips on Ins. c. 28, s. 8.

where the opinion of the witness is tendered upon a subject which requires peculiar study or experience in order to be acquainted with it, the evidence should be received; but that where the opinion is offered upon a matter of general knowledge, as to which the jury are equally competent to form a judgment, as, for instance, upon the question whether it was a material fact, that a vessel, which had sailed long after the ship insured, had arrived in England before the policy was effected (*r*), or when it relates to facts in respect of which no aid can be obtained by previous experience, so that the opinion of the witness, if rightly formed, can be drawn only from the same premises upon which the Court and jury have to determine the cause (*s*), the evidence should be rejected (*t*).

The losses which arise from the various perils insured against may be either *total* or *partial*; they are *total* when the subject-matter of the insurance is wholly destroyed, or injured to such an extent as to justify the owner in abandoning to the insurer, and *partial* when the thing insured is only partially damaged, or where, in the case of an insurance on goods or freight, the assured is liable to contribute to a general average (*u*).

LOSSES AND
THEIR INCIDENTS.
Losses total
or partial.

Total losses may again be divided into actual and constructive total losses. Actual total losses arise where the ship or cargo is totally destroyed or annihilated, or where they are placed by any of the perils insured against in such a position that it is wholly out of the power of the assured to procure their arrival (*x*).

Different
kinds of total
losses.
Actual total
losses.

(*r*) As in *Campbell v. Rickards*, *ubi supra*.

(*s*) As in *Carter v. Boehm*, *ubi supra*.

(*t*) See the notes to *Carter v. Boehm*, in 1 Smith's L. C. 572 (7th edit.), and Duer on Ins., Lect. 14, note 10.

(*u*) See *ante*, p. 425. The liability of the underwriter under the ordinary form of policy to contribute to a general average where such general average is the result or consequence of any of the perils insured against, is undoubted, whether the right of the assured is considered as arising from the terms of the memorandum under which the underwriter stipulates not to pay average under a certain percentage *unless general* (see *supra*, p. 491), or from the general scope of the contract entered into with the assured. *Hall v. Jansen*, 4 E. & B. 500; *Dent v. Smith*, L. R., 4 Q. B. 414. As to the liability of the underwriter in respect of general

average where the policy contains a provision that the underwriter is "to pay general average as per foreign statement," see *Harris v. Scaramanga*, L. R., 7 C. P. 431, and the other cases cited *supra*, p. 492, note (*g*). See also *Dent v. Smith*, *ubi supra*, p. 480, note (*b*), as to the liability of underwriters for the repayment of expenses other than general average expenses incurred or occasioned in consequence of the perils insured against. See also *supra*, p. 490, with regard to the expenses recoverable by underwriters under the suing and labouring clause.

(*x*) See *per* Lord Abinger in *Roux v. Salvador*, 3 B. N. C. 286; *Stringer v. The English and Scottish Marine Insurance Company*, L. R., 5 Q. B. 599; see also *Currie v. The Bombay Native Insurance Company*, L. R., 3 P. C. 72.

Thus, where by means of a peril insured against, a ship founders at sea, or is actually destroyed, or even where she is so much injured that she ceases to retain the character of a ship, and becomes a wreck, or a mere congeries of planks, the loss is total and actual, although the form of a ship may still remain; and in these cases the assured may recover for a total loss without abandonment (y).

So, goods are considered as actually lost if they are wholly lost to the owners by plunder, capture, or the like (z); or if they are so much injured by sea damage that they have lost their specific character; as, for instance, where they exist only as a nuisance, so that it is necessary to throw them overboard (a); or even, if by reason of such injury having commenced, it becomes certain that they could never have reached their destination unchanged in specific character, and it is consequently necessary to sell them at an intermediate port. Thus, where a cargo of hides was found to be so much damaged by the sea-water which had penetrated through a leak into the ship's hold that it would have been impossible to carry them to their destination in the form of hides, as they must, by the progress of putrefaction, have lost this character before their arrival, and they were consequently sold at an intermediate port for a fourth of their

(y) *Cambridge v. Anderton*, 2 B. & C. 691. See also *Read v. Bonham*, 3 B. & B. 147; *Green v. The Royal Exchange Assurance Company*, 6 Taunt. 68; *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755; *Robertson v. Clarke*, 1 Bing. 445; and the judgment of Maule, J., in *Moss v. Smith*, 9 C. B. 102; *Fleming v. Smith*, 1 H. of L. C. 513; and *Philpott v. Swann*, 11 C. B., N. S. 270. In *Cambridge v. Anderton*, the ship, after she was sold by the master, was actually got off the rocks and repaired by the purchaser; but the Court appears to have decided the case on the supposition that she was a mere wreck; and, moreover, no abandonment was possible, the intelligence of the loss and of the sale having reached the owners at the same time. See the judgments of Lord Campbell in *Fleming v. Smith*, and in *Knight v. Faith*, 15 Q. B. 663. As to what will justify a master in selling, see the judgment of the Privy Council in *The Cobequid Marine Insurance Company v. Barteaux*, L. R., 6 P. C. 319.

(z) *Mullett v. Shedden*, 13 East, 304; *Mellish v. Andrews*, 15 East, 13; *Bon-*

drett v. Hentigg, Holt, 149; *Dent v. Smith*, L. R., 4 Q. B. 414; *Stringer v. The Scottish Marine Insurance Company*, *ubi supra*.

(a) *Dyson v. Rowcroft*, 3 B. & P. 474; *Cologan v. London Assurance Company*, 5 M. & S. 447; *Navone v. Haddon*, 9 C. B. 30; see also the judgment of Lord Kenyon in *Burnett v. Kensington*, 7 T. R. 222. An early case, *Cocking v. Fraser*, 4 Doug. 295, S. C., 1 Park on Ins. 181, is to some extent inconsistent with these decisions, and Lord Mansfield is supposed to have laid down the rule in it, that there must be an absolute destruction of the goods in order to constitute a total loss. It is, however, to be observed, that in this case the goods actually arrived at the end of the voyage without change of specific character; the fish actually came to port as fish, although it was putrid. The American Courts act more strictly than our Courts do upon the rule that there must, in order to constitute an actual total loss, be a destruction of the thing insured. See 3 Kent Com. 296, and the cases cited, 2 Phillips on Ins. 483, 486.

value, it was held that the loss was an actual and not merely a constructive total loss, and consequently that the assured might recover without abandonment (*b*). The Court also laid down the following general propositions:—If goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; or if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; or, if the goods, although imperishable, are in the hands of strangers not under the control of the assured; or if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in all these cases, the circumstance of their existing in specie at that forced termination of the risk is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any insuperable obstacle (*c*).

But if the ship, although materially damaged, has not ceased to be a ship (*d*), or if the goods, although greatly deteriorated in value, still retain their original character (*e*), the assured must abandon.

Where the underwriters have paid on a total loss they are entitled to the benefit of all the rights and remedies which the assured possessed (*f*).

Rights of underwriters on payment on total loss.

(*b*) *Roux v. Salvador*, 2 B. N. C. 266, in *Cam. Soccc.*, overruling the decision of the Common Pleas in the same case, 1 B. N. C. 526; see also the judgment of Lord Ellenborough in *Hunt v. The Royal Exchange Assurance Company*, 5 M. & S. 65. In *Farnworth v. Hyde*, 18 C. B., N. S. 856, the Court said that the rule laid down in *Roux v. Salvador* extends "to all cases where the adventure is brought to an end by a peril, and the goods are taken out of the power of the assured in the course of their voyage, either by physical laws working decomposition, or by political laws working detention and sale by a Court, or by circumstances of distress and danger, creating what may be described as a mercantile necessity for a sale."

(*c*) See the judgment in *Roux v. Salvador*, 3 B. N. C. 266.

(*d*) *Martin v. Crockatt*, 14 East, 465; *Bell v. Nixon*, Holt, 423; *Knight v. Faith*, 15 Q. B. 649; see also *Tunno v. Edwards*, 12 East, 488.

(*e*) *Anderson v. The Royal Exchange Assurance Company*, 7 East, 38; *Thompson v. The Royal Exchange Assurance Company*, 16 East, 214.

(*f*) See *Simpson v. Thompson*, 3 App. Cas. 279; *The North of England Iron Steamship Insurance Association v. Armstrong*, L. R., 5 Q. B. 81; *Burnand v. Rodocanachi*, 5 C. P. D. 424; W. N. 1881, p. 37; see also *Darrell v. Tibbitts*, 5 Q. B. D. 560. Proceedings by the underwriters to reimburse themselves, if taken against third parties, must be taken in the name of the assured. *Simpson v. Thompson*, *ubi supra*.

A policy which is expressed to be confined to "total loss only," does not exclude a constructive total loss (*g*).

Constructive
total losses.

Losses are constructively total when the subject-matter of the insurance, although still in existence, is either actually lost *to the owners*, or beneficially lost to them, and notice of abandonment has been given to the underwriters (*h*).

Thus, where the ship, although existing as a ship, is captured or laid under an embargo, and has not been recaptured, or restored before action brought, so that she is lost to the owners (*i*), or where she is so damaged by a peril insured against as to be innavigable, and is so situated that either she cannot be repaired at the place where she is (*k*), or cannot be repaired so as to be made seaworthy without incurring an expense greater than her value when repaired (*l*), or has sunk in deep water, so that she cannot be raised without incurring an inadequate expense (*m*), the assured may abandon and treat the loss as total loss. And if a ship be so damaged during the voyage covered by the policy, the assured may abandon; although the ship afterwards complete her voyage, discharge cargo and earn freight (*n*).

A ship insured by a time policy was captured by pirates and re-taken as prize and taken into port by a Queen's ship. The assured, on learning these facts, gave notice of abandonment after the expiration of the policy, but within a reasonable time.

(*g*) *Adams v. Mackenzie*, 13 C. B., N. S. 442; 32 L. J., N. S. 711.

(*h*) See the cases cited on p. 529. As to the notice of abandonment and the effect of abandonment, see *post*, pp. 538, 539, 541; and as to constructive losses on policies on freight, see *post*. The doctrine of a constructive total loss does not apply to an insurance on bottomry. *Broomfield v. The Southern Insurance Company*, L. R., 5 Ex. 192.

(*i*) See the judgment of Lord Mansfield in *Goss v. Withers*, 2 Burr. 694, 696; *Hamilton v. Mendes*, *ib.* 1198; and the judgment in *Roux v. Salvador*, 3 B. N. C. 266; see also, with respect to cargo, *Stringer v. The English and Scottish Marine Insurance Company*, L. R., 5 Q. B. 599, where a policy contained a stipulation that the insurers should pay "a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." It was held that the claim for a total loss became vested on the expiration of the thirty days, though it turned out that there was

only a temporary embargo, and no condemnation. *Fowler v. The English and Scottish Marine Insurance Company*, 18 C. B., N. S. 818; 34 L. J., C. P. 253; see also *Rodoconachi v. Elliot*, L. R., 9 C. P. 518.

(*k*) See the ruling of Tindal, C. J., in *Somes v. Sugrue*, 4 C. & P. 283. See also *Reed v. Bonham*, 3 B. & B. 147.

(*l*) *Allen v. Sugrue*, 8 B. & C. 561; and the cases cited on the next page.

(*m*) *Kemp v. Halliday*, L. R., 1 Q. B. 520, where the Court of Exchequer Chamber said that it was a total loss if deducting a general average in respect of the cargo (if any), the cost of raising the ship, plus the sum to be spent in repairing her when raised, would exceed her full value when repaired.

(*n*) *Stewart v. The Greenock Marine Insurance Company*, 2 H. L. Cases, 159; *S. C.*, 1 Macq. 328; *The Scottish Marine Insurance Company v. Turner*, *ib.* 334. Freight earned after the abandonment belongs to the underwriter, *ib.*; *Barclay v. Stirling*, 5 M. & S. 6.

The ship was sent home for adjudication, but on her voyage, meeting with bad weather, she was taken into port and sold by the prize master who had charge of her. It was held, under these circumstances, that the assured were entitled to recover for a total loss (o).

In like manner, if the goods, although they exist in specie, are prevented by embargo, capture, or the like, from reaching their port of destination, so that the voyage is not merely retarded, but its objects are entirely lost (p), or if, owing to an injury to the vessel, and there being no other means of transport, they cannot be forwarded at all (q), or if they are so damaged by a peril insured against that if sent on they would be worth nothing, or less than the expense which must necessarily be incurred in forwarding them, the assured may, by abandoning, treat the loss as constructively total (r). So, where advances made for the transport of Chinese emigrants upon a particular voyage were insured, and the emigrants piratically ran away with the ship, and, landing, deserted her before the voyage was ended, this was held to amount to a total loss of the sums insured (s). If however, the ship, although once captured, is re-taken or restored before action brought (t), or if, in cases

Seizure, arrest or detention.

(o) *Dean v. Hornby*, 3 E. & B. 180. See also *Lozano v. Janson*, 2 E. & E. 160.

(p) *Barker v. Blakes*, 9 East, 283; *Cologan v. The London Assurance Company*, 5 M. & S. 447; *Lozano v. Janson*, 2 E. & E. 160; *Rodoconachi v. Elliot*, L. R., 9 C. P. 518. See also *Wilson v. Jones*, L. R., 1 Ex. 193; *S. C.*, Cam. Scacco, L. R., 2 Ex. 139, where the breaking of the Atlantic Cable was held to be a total loss.

(q) *Anderson v. The Royal Exchange Assurance Company*, 7 East, 38; *Wilson v. The Royal Exchange Assurance Company*, 2 Camp. 623.

(r) *Gernon v. The Royal Exchange Assurance Company*, 6 Taunt. 383; *Parry v. Aberdeen*, 9 B. & C. 411; *Navone v. Haddon*, 9 C. B. 30; *Rosetto v. Gurney*, 11 *id.* 176; *Farnworth v. Hyde*, 18 C. B., N. S. 836. If goods of the same kind, belonging to different owners, become so mixed up during a voyage, owing to perils insured against, that it is impossible to distinguish the several owners' property, they are not to be considered as totally lost, either actually or constructively; and the owners consequently will be considered tenants in common of the whole; *Spence v. The*

Union Marine Insurance Company, L. R., 3 C. P. 427.

(s) *Naylor v. Palmer*, 8 Ex. 739; *S. C.*, Cam. Scacco, 10 Ex. 382.

(t) See the judgments in *Goss v. Withers*, 2 Burr. 694, and in *Hamilton v. Mendes*, *ib.* 1211; *Bainbridge v. Neilson*, 10 East, 329; *Falkner v. Ritchie*, 2 M. & S. 290; *Brotherston v. Barker*, 5 M. & S. 418. If the ship is restored after abandonment in such a condition that the owners cannot reasonably be expected to take her back, as where, for instance, she is offered to them charged with expenses of salvage and repairs equalling or exceeding her value, this will not have the effect of making the loss merely partial. See the judgment of Bayley, J., in *Holdsworth v. Wise*, 7 B. & C. 799, and of the Court in *Lozano v. Janson*, 2 E. & E. 176. If once there has been a total loss by capture, that is construed to be a permanent total loss, unless something occurs afterwards by which the assured either has the possession restored or has the means of obtaining such restoration. *Per Lord Campbell, C. J.*, in *Dean v. Hornby*, 3 E. & B. 190.

of salvage, the owners could by payment of such a sum of money as it is in their power to procure, obtain possession of her (*u*), or if the ship, although much injured by a peril insured against, can practically be repaired, that is, can be repaired without incurring a greater expense than she would be worth when repaired, the assured is not entitled to abandon (*x*). So, if the goods are recaptured and arrive at their destination (*y*), or if the whole or any part of the cargo, although damaged, exists in specie, and can be sent to its destination in a marketable state without incurring more expense than it would be worth on its arrival there, the loss is only partial (*z*). The mere loss of the voyage is never sufficient to create a constructive total loss on the ship (*a*). And, with respect to goods, the temporary detention of the ship, or the retardation of the voyage, so as to lose a season, or even the loss of the voyage, if the goods are not of such a perishable nature as to make the loss of the voyage a loss of the commodity itself, will not constitute a constructive total loss (*b*).

What circumstances shall amount to a total loss from capture or embargo, is sometimes made the subject of an express stipulation in the policy (*c*).

Test of constructive total loss.

The ordinary test by which to decide whether the loss of the ship is constructively total or partial only, is whether a prudent uninsured owner, if on the spot, would have incurred the expense of repairing. If he would not, the loss is constructively total (*d*). In other words, the question in all cases is whether

(*u*) *Thornely v. Hesbon*, 2 B. & A. 513.

(*x*) *Doyle v. Dallas*, M. & Rob. 48; *Gardner v. Salvador*, *ib.* 116; and see *Chapman v. Benson*, 5 C. B. 330.

(*y*) *Patterson v. Ritchie*, 4 M. & S. 393.

(*z*) *Thompson v. The Royal Exchange Assurance Company*, 16 East, 214; *Davy v. Milford*, 15 East, 559; *Wilson v. The Royal Exchange Assurance Company*, 2 Camp. 623; *Navone v. Haddon*, 9 C. B. 30; *Rosetto v. Gurney*, 11 C. B. 176; *Michael v. Gillespie*, 2 C. B., N. S. 641, and *Farnworth v. Hyde*, L. R., 1 C. P. 204, *ante*, p. 527, note (*b*).

(*a*) *Pole v. Fitzgerald*, Willes, 641; *S. C.*, before the House of Lords, 3 Brown's P. C. 131; *Parsons v. Scott*, 2 Taunt. 363.

(*b*) *Anderson v. Wallis*, 2 M. & S.

240; *Hunt v. The Royal Exchange Assurance Company*, 5 M. & S. 47. See, however, *Stringer v. The English and Scottish Marine Insurance Company*, *ante*, p. 528, note (*g*). In *De Mattos v. Saunders*, L. R., 7 C. P. 570, it was held that a partial loss can only be converted into a total loss by the natural and necessary consequence of a peril insured against.

(*c*) *Fowler v. The English and Scottish Marine Co.*, 18 C. B., N. S. 818; *ante*, p. 528, note (*h*).

(*d*) *Roux v. Salvador*, 3 B. N. C. 266; *Manning v. Irving*, 1 C. B. 168; 2 C. B. 784; 6 C. B. 391; *Moss v. Smith*, 9 C. B. 94; *Somes v. Sugrue*, 4 C. & P. 276; *Domett v. Young*, 1 Car. & M. 465. Freight is not totally lost by perils of the sea simply because the cost of the repairs of sea damage neces-

it would cost more to repair the ship so as to make her seaworthy than she would be worth when repaired.

In considering the relation which the cost of repair would bear to the value of the ship when repaired, the question is not varied by the age of the vessel; if by reason of her natural decay more extensive repairs would be necessary to repair the injuries caused by the perils insured against, and from this cause the expenses would exceed the value of the ship when repaired, the assured may still abandon (e).

In estimating the value of the ship when repaired her mere market value is not the proper test, but her value to her owners. Where a vessel is of exceptional size or class, and built for any special service, this distinction becomes very material. Thus, where in a special case it was found that a ship had originally been bought for 20,000*l.*, that 20 per cent. would be a reasonable deduction in respect of wear and tear at the time when the policy attached, that the cost of building such a ship at that time would have been 20,000*l.*, and the cost of repairing her would have been 10,500*l.*, and that her market value after she had been repaired would have been 7,500*l.* as she was a vessel of exceptional size and class, but that an owner wanting such a ship for the particular purposes of his trade, and having to elect either to sell, or to repair, or to purchase, would have elected to repair her, for such a vessel could not have been built or purchased at that time for so small a sum as 10,500*l.*; it was held that the inference from these facts was, that the cost of repairs would not have exceeded the value of the ship when repaired, and therefore that the loss was an average loss only, and not a constructive total loss (f).

The same test is, however, inapplicable in some cases of damage to goods; for instance, where a cargo meets with sea damage, and the master is obliged to put into an intermediate port, it may well happen that considering the state of the market there, and the expense of taking on the cargo, an immediate sale would be more beneficial to the owner of the goods than a

nary to earn it would be greater than the freight. *Moss v. Smith*, 9 C. B. 94, and *Philpott v. Swann*, 11 C. B. N. S. 270.

(e) *Phillips v. Nairne*, 4 C. B. 343; see also *Hyde v. The Louisiana State Insurance Company*, 3 Mason (American)

Rep. 27.

(f) *Grainger v. Martin*, 2 B. & S. 456. This judgment was affirmed in the Exchequer Chamber; see *Grainger v. Martin*, 4 B. & S. 9, Martin, B., and Keating, J., dissenting.

prosecution of the voyage; yet if the goods could be carried to their destination, in such a condition, that allowing for all the necessary extra expenses caused by the damage, they could be sold there at any profit, the loss is not total (e). The extra expenses which may in these cases be taken into calculation are, the costs of unshipping, warehousing, drying, and of transshipping, where any of these operations are in fact necessary, and any salvage which is payable may also be reckoned; but a sum payable to persons who have in the emergency advanced money on a bottomry bond, cannot be taken into the account (f).

Where the insurance was on ship, and the question was whether she having sunk with her cargo, the owner could abandon, or ought to have incurred the expense of raising her, it was held, that the fact that the cargo would be saved, and would have to contribute by general average to the expense, was one of the elements to be considered (g).

Improper sale
by master.

The question whether the master acted rightly in selling the vessel or cargo, is often incidentally material in considering whether there has been a constructive total loss (h). It is, however, only incidentally so, for the sale does not constitute the loss; the loss is the antecedent damage to the ship or cargo which renders the sale justifiable; there is no such loss

(e) *Reimer v. Ringrose*, 6 Ex. 263. In this case the Court appears to have considered that the expense of forwarding the cargo, whether there is a transshipment or not, is an extra expense, which should be estimated in considering whether the loss was total or partial only. The Court of Common Pleas, however, in *Rosetto v. Gurney*, 11 C. B. 176, pointed out the error of this view, saying: "If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is damaged (without considering whether he is bound to tranship or merely at liberty to do so), it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight."

In our opinion, to this extent, and to this extent only, the cost of transit should be taken into consideration in ascertaining the practicability of delivering the cargo, or part of it, in a

marketable state at the port of discharge"; see also *Farnworth v. Hyde*, 18 C. B., N. S. 835; L. R., 1 C. P. 204, ante, p. 527, note (b); *Meyer v. Ralli*, L. R., 1 C. P. D. 368. This would appear to be the true rule, and to be in accordance with the principles laid down in *Duncan v. Benson*, 1 Ex. 537; 3 Ex. 644; and *Benson v. Chapman*, 8 C. B. 950. As to the expense of forwarding a cargo where by the policy it is warranted "free from average unless general," see *The Great Indian Peninsula Railway Company v. Saunders*, 1 B. & S. 41; *S. C.*, in Cam. Scacc., 2 B. & S. 266; *Booth v. Gair*, 15 C. B., N. S. 291; *Kidston v. The Empire Insurance Company*, L. R., 1 C. P. 535; 2 C. P. 357; *Meyer v. Ralli*, *ubi supra*, and ante, p. 490.

(f) See the cases cited in the last note.

(g) *Kemp v. Halliday*, L. R., 1 C. P. 520; 6 B. & S. 723.

(h) *Currie v. The Bombay Native Insurance Company*, L. R., 3 P. C. 72; *The Cobequid Marine Insurance Company v. Bartheaux*, L. R., 6 P. C. 319. See also *Hall v. Jupe*, 49 L. J., C. P. 721.

known in insurance law as a sale by the master, unless it be barratrous (i). Where it was the duty of a captain at a port into which his vessel with cargo had been driven by stress of weather to tranship and forward goods, but he, neglecting to do so, they were sold by order of a local Court to pay for advances, it was held that the loss was not a constructive total loss, because the sale was not due to a peril insured against, but arose from the misconduct of the master after the perils had ceased to operate (j).

In ascertaining whether a loss is total or not, the same test is applicable to valued as to open policies; notwithstanding that the effect of this rule is, to allow the assured, in some cases, to recover more than a compensation for his loss. It is now well settled that the valuation in the policy cannot be looked to in order to determine whether a loss is total or not, the object of the valuation being to prevent disputes by ascertaining the sum which the underwriter is to pay in case a total loss is proved, and not to fix a conventional value at which the vessel is to be put in considering the propriety of repairing. The question, therefore, in these cases, is to be determined as if there were no policy at all, by inquiring what a prudent man uninsured would have done (k). Thus, where a ship, worth to be sold in the market 9,000*l.* only when the policy was effected and when the damage was sustained, but valued in the policy at 17,500*l.*, was so injured during her voyage that she could not proceed without an expenditure of 10,500*l.*, and when repaired she would have been worth only 9,000*l.*, and the jury found that a prudent owner uninsured would not have repaired, it was held that this was a case of constructive total loss, and also that the

Test where
policy valued.

(i) See the judgment in *Knight v. Faith*, 15 Q. B. 689; and the observation of Bayley, B., in *Gardner v. Saloador*, 1 M. & Rob. 117; *Farnworth v. Hyde*, *ubi supra*. See also *Kaltenbach v. Mackenzie*, 3 App. Ca. 467, where it was held that if the assured receives reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound to give notice of abandonment, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold. Where the right of an owner to abandon was resisted on the

ground that if a good judgment had been exercised when the ship struck, a total loss might have been avoided, it was held that evidence was admissible to show that the captain was, previously to the voyage insured against, a habitual drunkard. *Alook v. The Royal Exchange Assurance Company*, 13 Q. B. 292.

(j) *Meyer v. Ralli*, 1 C. P. D. 358.

(k) *Allen v. Sugrue*, 8 B. & C. 561; *Young v. Turing*, 2 S. N. R. 752; *Manning v. Irving*, 1 C. B. 168; *S. C.* in error, 2 C. B. 784; 6 C. B. 391; and *supra*, p. 458.

assured were entitled to recover the value mentioned in the policy (*l*).

Loss of freight.

With respect to insurances on freight. The assured cannot recover unless the loss takes place upon the voyage insured (*m*). It is obvious also, that no loss can be sustained or abandonment made in respect of freight actually earned; the question of loss, therefore, can only arise in cases of pending or current freight (*n*). If the ship is injured and obliged to put back to repair, or meets with an irreparable injury, so as to be unable to proceed with her cargo, or is stranded and cannot be got off without incurring a ruinous expense, the loss of freight is total, and the assured may recover without abandonment (*o*). So, if a ship before reaching her port of loading, meets with perils which occasion such a delay as renders the voyage contemplated impracticable, and so excuses the charterer from loading (*p*). But if the goods could be forwarded by another vessel (*q*), or if the ship could be repaired at a cost less than her value when repaired, although it may exceed the value of the freight, so as to bring home the cargo or any part of it, the loss of the freight is not total (*r*). Freight may be insured by a time policy, though for a period short of the time necessary to complete the voyage on which the freight is to be earned; and there is a total loss of freight if the cargo be so damaged by a sea-peril in the course of the voyage as to render it impossible, except at an expense which would greatly exceed its value on arrival, to carry it to its port of destination (*s*).

Where there was a policy on ship, and another on chartered

(*l*) 1 C. B. 168; 2 C. B. 784; 6 C. B. 391; *Manning v. Irving*, *ubi supra*.

(*m*) *Sellar v. M'Vicar*, 1 N. R. 23. As to the extent of the underwriters liability where the insurance was on "one-third loss of freight in consequence of sea damage," see *Griffiths v. Bramley*, Moore, 4 Q. B. D. 70.

(*n*) The amount recoverable in respect of a loss on freight will therefore depend on the terms of the charter-party. See *Atty v. Lindo*, 1 N. R. 236; *Wilson v. Forster*, 6 Taunt. 25; *Everth v. Smith*, 2 M. & S. 278. There may be a total loss of an unpaid portion of freight. *Allison v. Bristol Marine Insurance Company*, 1 App. Cases, 209. As to what is an insurable interest in freight, see *ante*, p. 464.

(*o*) *Green v. The Royal Exchange Assurance Company*, 6 Taunt. 68; *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755; *Mount v. Harrison*, 4 Bing. 388; *De Cuadra v. Swann*, 16 C. B., N. S. 772.

(*p*) *Jackson v. The Union Marine Insurance Company*, L. R., 8 C. P. 572; 10 C. P. 125, where the question mostly considered was what delay would justify the charterer in not loading the ship.

(*q*) *Parneter v. Todhunter*, 1 Camp. 541.

(*r*) *Moss v. Smith*, 9 C. B. 94, and *Philpott v. Swann*, 11 C. B., N. S. 270; see also *Green v. The Royal Exchange Assurance Company*, *ubi supra*, and *Mordy v. Jones*, 4 B. & C. 394.

(*s*) *Michael v. Gillespy*, 2 C. B., N. S. 627.

freight for the homeward voyage, and the ship was so injured on her outward voyage that her owner properly abandoned her to his underwriter; it was held, by the House of Lords, that there was a loss of freight by perils of the sea, and, further, that as nothing remained to be transferred to the underwriter on freight, no notice of abandonment was necessary (*t*).

In a case (*u*) which arose on a policy on freight, the ship having met with serious injury by striking on a rock was compelled to put back and unship her cargo. The master repaired her, borrowing money for the purpose on bottomry at an expense which ultimately exceeded the value of both ship and freight, and having re-shipped the cargo, the vessel proceeded and performed her voyage, and earned freight which was paid to the holders of the bottomry bond. Before the arrival of the ship, however, the owners on receiving intelligence of the damage, and of the probable expense of the repairs, had abandoned both ship and freight to the underwriters. The jury having found that all parties had acted *bond fide*, and that the owner of the ship had acted as a prudent owner of ship and freight, if uninsured, would have acted, it was held that the assured could not recover for either a total or partial loss of freight, as he was bound by the act of his master in repairing, and the freight had not been lost, but, on the contrary, had been actually earned, and paid, in effect, to the assured by its payment to the holders of the bottomry bond.

Where a policy was on "money advanced on account of freight," subject to the ordinary memorandum, and the action was brought in respect of a general average loss, it was held that a plea alleging that by a custom in London the insurers were not bound to make good general average losses on such a policy was bad upon demurrer, such a custom being inconsistent with the terms of the policy, and therefore inadmissible (*x*).

Of money
advanced on
account of
freight.

Where passage money was insured against all costs, charges, and liabilities to which the owner or charterer might be subject under certain sections of the repealed Passengers Act of 1852 (15 & 16 Vict. c. 44), and the ship was lost but the passengers

Of passage
money under
Passenger
Acts.

(*t*) *Rankin v. Potter*, L. R., 6 H. L. 83.
(*u*) *Benson v. Chapman*, 8 C. B. 950.
The Court held in this case that it could not assume from the fact of the expenses ultimately exceeding the value

of the ship, that the master had, in repairing, acted beyond the scope of his authority, or that the owner, if on the spot, would not have elected to repair.
(*x*) *Hall v. Janson*, 4 E. & B. 500.

were saved in a British colony short of their port of destination, to which, however, the master within six weeks forwarded them; it was held that the expenses so incurred might be recovered under the policy, for one of the sections referred to made it the duty of the master to forward the passengers at the expense of the owners under the circumstances which had occurred (*y*). It was held to be otherwise, however, where the expenses were incurred in respect of the maintenance of passengers during the repairs of the ship on the voyage, the policy not referring to the sections of the statute which threw this expense on the shipowners (*z*).

Losses after
period insured
owing to pre-
vious injury.

Whether the underwriter is liable for a loss which happens after the period covered by the policy, through an injury sustained during that period, is a question which has been much discussed. It has been argued that the underwriters are not liable, in these cases, for a total loss, because none happens during the period for which the vessel was insured; nor for a partial loss, because the actual damage incurred within that period must be taken to be merged in the subsequent total loss. In an early case (*a*), where a ship, three days before the expiration of a time policy, received her death's wound, but, by pumping, was kept afloat till three days after the time, the insurer was held not liable. In a later case (*b*), it was held that the assured were entitled to recover upon a voyage policy for a total loss which occurred after, but arose from an injury received before, the determination of the voyage; but, in that case, the policy included, in terms, the vessel's stay at the port where she was actually lost.

The earlier of these cases has been supposed to lay down the rule, that where a ship, insured under a time policy, receives damage during the period insured, which ultimately causes her loss, but she is kept afloat, as a ship, until after that period, the underwriter cannot be charged with either a total or a partial loss, and the decision has, on this supposition, been censured by foreign jurists (*c*). But it may well be doubted whether any such doctrine was intended to be asserted in that case; and in

(*y*) *Gibson v. Bradford*, 4 E. & B. 586.

(*z*) *Willis v. Cooke*, 5 E. & B. 641.

(*a*) *Merestony v. Dunlope*, cited by Willes, C. J., in *Lockyer v. Offley*, 1 T. R. 280.

(*b*) *Shaw v. Felton*, 2 East, 109.

(*c*) *Benecké Princ. of Indemn. c. 8, s. 3*; *Phillips on Ins. c. 13, s. 14*; 3 Kent Com. 308, note.

a modern case (*d*), where a ship received her death-blow before the expiration of a time policy, but the extent of the damage was not discovered until after it had expired, when it was found that she could not be prudently repaired, and she was in consequence sold, it was held that the underwriters were liable for the partial loss which had occurred before the expiration of the time limited in the policy.

It is clear, however, that if a total loss follows after a partial loss, but arises from an independent cause, excepted in the policy, so that the assured is not in any degree in a worse position by reason of the partial loss, the underwriters are not liable for the partial loss (*e*). Thus, where a ship insured from New York to London warranted free from American condemnation, was driven on shore by the wind and tide and suffered a partial loss by sea damage, and whilst on shore was seized and condemned by the American Government, it was held that the underwriters were not liable, either for a total or for a partial loss; not for a total loss, as, according to the maxim *causa proxima non remota spectatur*, the loss must be attributed to the capture; nor for a partial loss, because although the damage made the ship of less value to the American Government, the assured was not injured, being in no worse situation than if it had not occurred (*f*).

It will be observed that sometimes cases apparently of total loss, prove eventually to be partial losses only; as where there is a capture and recapture, or where a forcible detention, instead of lasting so long as to render it impossible to bring the ship or goods to their destination, terminates speedily (*g*). And it must be recollected that whether a loss is partial or constructively

(*d*) *Knight v. Faith*, 15 Q. B. 649. It was unnecessary in that case to decide whether the underwriters were liable for a constructive total loss as the vessel had not been abandoned; and the underwriters not being therefore liable to pay for the final loss of the ship, even assuming it to have been a total loss resulting from the damage incurred during the currency of the policy, the partial loss could not merge; but the Court disapproved of the doctrine supposed to have been acted on in *Meretony v. Dunlop* (cited 1 T. R. 260); see 15 Q. B. 667.

(*e*) But where there are two policies, one attaching at the expiration of the

other, and a partial loss occurs under the first, and a total loss under the second, the rule is, that each contract must be viewed separately, and the underwriter will be held liable both for the partial loss under the first, and the total loss under the second. *Lidgett v. Secretan*, L. R., 6 C. P. 616.

(*f*) *Livie v. Jansen*, 12 East, 648. See also the remarks upon this case in the judgment of the Court in *Knight v. Faith*, 15 Q. B. 668, and *Naylor v. Palmer*, 8 Ex. 739; 10 Ex. 382.

(*g*) See the cases cited on the present page, *Dean v. Hornby*, 3 E. & B. 180, and the judgment in *Bous v. Salvador*, 3 Bing. N. C. 286.

Where loss
supposed total
is afterwards
found partial.

total, depends always upon the facts as they appear, not at the time of abandonment (*h*), but at the time of action brought. If, therefore, that which was supposed to be a total loss at the time of the notice of abandonment is only a partial loss at the time of action brought, as, where a ship is captured, and after abandonment and before action recaptured, the assured cannot recover as for a total loss. In order, however, to divest the right of the assured under the abandonment, the thing insured must be offered or returned to them, or must arrive at its destination under such circumstances that they may, if they please, have possession of it, and may be reasonably expected to take it (*i*).

Abandonment
and its effects.

We have already seen that it is always necessary, in order to make a loss constructively total, that the assured should abandon (*l*). This is a reasonable and equitable rule, not resulting from any express stipulation in the contract of insurance, but annexed to it by the law merchant; for, on the one hand, long interruption to a voyage, and uncertain hopes of recovery, being, in mercantile transactions, often ruinous, it is reasonable that the assured should be allowed to disentangle himself from unprofitable trouble and further expense by treating the injury sustained by the insured property as amounting

(*h*) See the judgment of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210; *Bainbridge v. Neilson*, 10 East, 329; *Falkner v. Ritchie*, 2 M. & S. 290; *Parsons v. Scott*, 2 Taunt. 363; *Brotherston v. Barber*, 5 M. & S. 418; *Naylor v. Taylor*, 9 B. & C. 718. The correctness of this rule was doubted by Lord Eldon in *Smith v. Robertson*, 2 Dow, 474, but it is now clearly established. The law in France and America is otherwise. Emerigon *Traité des Ass.* tom. 2, 196. By the Code de Commerce, Art. 385, "Le délaissement signifié et accepté ou jugé valable, les effets assurés appartiennent à l'assureur, à partir de l'époque du délaissement. L'assureur ne peut, sous prétexte du retour du navire, se dispenser de payer la somme assurée." See also 3 Kent Com. 324, and *Peele v. The Merchants' Insurance Company*, 3 Mason (American) Rep. 27, where Story, J., says: "An abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by

any subsequent events."

(*i*) See *M'Iver v. Henderson*, 4 M. & S. 576, where it was held that the assured were not bound by the mere restitution of the ship's hull under conditions which made it doubtful whether they would not have to pay more than it was worth. See also *Holdsworth v. Wise*, 7 B. & C. 794; *Parry v. Aberdeen*, 9 B. & C. 411; *Lozano v. Janson*, 2 E. & E. 160. In the latter case the Court adopted the rule laid down by Bayley, J., in *Holdsworth v. Wise*, *ubi supra*, that, to reduce a loss once total to a partial loss, the subject of the insurance "must be in existence under such circumstances that the assured may, if they please, have possession, and may reasonably be expected to take possession of it."

(*l*) *Ante*, p. 528; *Knight v. Faith*, 15 Q. B. 648; *Stewart v. The Greenock Marine Insurance Company*, 2 H. of L. C. 159. See as to the grounds upon which the doctrine of abandonment is founded, the judgment in *Rankin v. Potter*, L. R., 6 H. L. 83.

to a total loss; and, on the other, it is required by the very principle of a contract of indemnity, that the thing insured should, if it still exist, be ceded to the underwriters, and that they should have an early opportunity of inquiring into the facts, and of protecting themselves against fraud (*m*). The assured is not, indeed, in any case *obliged* to abandon; nor will the want of an abandonment oust him of his claim for an average loss or an actual total loss, as the case may be (*n*). But if he fail to abandon when the loss is only constructively total, he is entitled to indemnity as for a partial loss only (*o*). On the other hand, the assured cannot by abandoning, without the consent of the underwriter, treat as a constructive total loss that which is clearly a mere partial loss (*p*).

Notice of abandonment, to be valid, must be given by the real owner of the ship or goods insured, or by his duly authorized agent. One with whom a policy of insurance has been deposited as a security for a loan has no implied authority to give notice of abandonment. A notice, therefore, given by him without the express authority of the owner, will be of no avail to the latter (*q*). Notice of abandonment.

An abandonment must be total and not partial; that is, one part of the property insured may not be retained whilst the rest is abandoned (*r*). The mode in which an abandonment is usually made, is by a notice from the assured to the underwriter, which is called a notice of abandonment. This notice, although usually in writing, is not necessarily so (*s*). It must be express and direct in its terms (*t*); a communication of intelligence received, with a request how to proceed, is not sufficient (*u*). Where an owner on obtaining ill news of his vessel, communicated it to the underwriters and expressed a desire to abandon,

(*m*) See the judgments in *Goss v. Withers*, 2 Burr. 697; *Hamilton v. Mendes*, *ib.* 1209; and in *Roux v. Salvador*, 3 B. N. C. 275, and 3 Kent Com. 318.

(*n*) See *Mellish v. Andrews*, 15 East, 13.

(*o*) *Knight v. Faith*, 15 Q. B. 649, see *Kallenbach v. Mackenzie*, 3 C. P. D. 467; 3 App. Cases 467.

(*p*) See the cases cited above, and *Cazalet v. St. Barbe*, 1 T. R. 187.

(*q*) *Rankin v. Potter*, L. R., 6 H. L. 83; *Jardine v. Leathley*, 3 B. & S. 700. See also *Arnould on Ins.* 1161,

and *Gordon v. Massachusetts Fire and Marine Insurance Company*, 2 Pickering's Rep. (Amer.) 249.

(*r*) 1 Park on Ins. 229.

(*s*) *Parmeter v. Todhunter*, 1 Camp. 541. It is not necessary to use the word abandoned in a notice of abandonment, any equivalent expression is sufficient. *Currie v. The Bombay Native Insurance Company*, L. R., 3 P. C. 72.

(*t*) *Thellusson v. Fletcher*, 1 Esp. 73; *Parmeter v. Todhunter*, 1 Camp. 541.

(*u*) *Martin v. Crokatt*, 14 East, 465. As to what is sufficient, see *King v. Walker*, 2 H. & C. 384.

but the underwriters insisted on the vessel being repaired, and told the owner to pay the bills, and he consented at last that the repairs should be done, but refused to advance any money, and it became therefore necessary to raise money upon a bottomry bond, under which (the underwriters refusing to discharge it) the vessel was afterwards sold, the Court held, that although, there having been no abandonment, there had been no constructive total loss, yet that the underwriters having expressly directed the repairs, were liable for all the damage which the owner had incurred by reason of their refusal to pay the bond (*x*).

It has been said, that if the underwriters object to the abandonment, they must do so within a reasonable time, and that by silence they must be taken to acquiesce in it (*y*).

No formal acceptance of abandonment.

No writing or formal assent is required by English law in order to constitute an acceptance of the abandonment (*z*).

Time of giving notice of abandonment.

The abandonment must take place within a reasonable time after the assured has received intelligence of all the facts of the case, and has or might have discovered the condition of the insured property (*a*). The object of this rule is to give the underwriter the earliest opportunity of obtaining as much benefit as possible from any part of the property that may still be of value (*b*). What is a reasonable time must depend upon the circumstances of each particular case.

The assured should give notice of abandonment at the earliest opportunity (*c*). In one case, three weeks (*d*), and in another,

(*x*) *Da Costa v. Newnham*, 2 T. R. 407.

(*y*) *Hudson v. Harrison*, 3 B. & B. 97; see, however, *Peele v. Merchants' Insurance Company*, 3 Mason (American) Rep. 27.

(*z*) If notice of the abandonment is given to the underwriters, and the insurers then say and do nothing, the conclusion is they do not mean to accept the abandonment, but there may be a constructive acceptance of the abandonment. *The Provincial Insurance Company v. Leduc*, L. R., 6 C. P. 224.

(*a*) *Gernon v. The Royal Exchange Assurance Company*, 6 Taunt. 383; the judgments in *Knight v. Faith*, 15 Q. B. 659; and *Grainger v. Martin* in Cam. Soc., 4 B. & S. 9; *King v. Walker*, *vide supra*. See *Browning v. The Provincial*

Insurance Company of Canada, L. R., 5 P. C. 263.

(*b*) See the judgment in *Rous v. Salvador*, 3 B. N. C. 286; and the judgment of Lord Kenyon in *Allwood v. Henckell*, 1 Park on Ins. 281; *Mitchell v. Edie*, 1 T. R. 608; *Davy v. Milford*, 15 East, 559; *Abel v. Potts*, 3 Esp. 242; *Fleming v. Smith*, 1 H. of L. C. 513.

(*c*) *Dean v. Hornby*, 3 E. & B. 180. See as to this generally the judgments in the House of Lords in *Rankin v. Potter*, L. R., 6 H. L. 83, and of the Court of Appeal in *Kaltenbach v. Mackenzie*, 3 C. P. D. 467.

(*d*) *Anderson v. The Royal Exchange Assurance Company*, 7 East, 38; see also *Barker v. Blakes*, 9 East, 283; *Aldridge v. Bell*, 1 Stark. 498; *Kelly v. Walton*, 2 Camp. 155.

five days (e), after the receipt of the intelligence of the loss, was held to be too late. If the owner abandons as soon as he is furnished with all the facts, he will not be prejudiced by a delay on the part of his captain in communicating the intelligence to him (f).

If, however, the assured by his own acts, as for instance, by recognizing a sale of damaged goods as on his account, and by retaining the proceeds of such a sale in his own or his agent's hands, or by any course of conduct with a view to his own interest, prejudices the interests of the underwriters in the recovery of the produce of the thing insured, he precludes himself from recovering as for a total loss (g).

The effect of an abandonment is to transfer the whole property and interest in the thing insured to the underwriter, as from the date of the loss (h); and consequently it enures as a binding agreement to assign, if necessary, what is abandoned; the assured in the meantime being in the position of a trustee for the underwriter (i). Where a ship is abandoned, the underwriter is considered as the purchaser of the ship from the moment of the casualty to which the abandonment refers, and he becomes entitled not merely to her hull, but to the use of her, and to the advantages resulting from the completion of the voyage (j). Moreover, after the assured has been paid by the insurer for the loss on the policy, the insurers are put into the place of the assured with regard to every right given to him by

Effect of
abandonment.

(e) *Hunt v. The Royal Exchange Assurance Company*, 6 M. & S. 47.

(f) *Read v. Bonham*, 3 B. & B. 147.

(g) See *Mitchell v. Edie*, 1 T. R. 608; and the observations on this case in *Roux v. Salvador*, 3 B. N. C. 289.

(h) *Cammell v. Sewell*, 3 H. & N. 617; *S. C.* in *Cam. Scacc.*, 5 H. & N. 728. See also *Arnould on Ins.*, sect. 413, and the foreign authorities collected in note (z) to that section. In America, the same rule prevails as in England. See *Robinson v. The United Insurance Company*, 1 Johnson (U. S.) Rep. 592.

(i) See the judgment of Lord Truro in *The Scottish Marine Insurance Company v. Turner*, 1 Macqueen's H. of L. C. 342. Where a vessel insured by a valued policy is destroyed by a collision with a wrong-doing vessel, the

underwriters, after payment on the policy, are entitled to whatever damages may be recovered by the assured from the owner of the wrong-doing vessel in respect of the collision. *The North of England Insurance Company v. Armstrong*, L. R., 6 Q. B. 81. The underwriters, however, have no right to any damages which the assured could not himself have recovered. *Simpson v. Thompson*, 3 App. Cases, 279.

(j) See the judgment of Lord Ellenborough in *Case v. Davidson*, 5 M. & S. 82. According to the practice of the Court of Admiralty, the underwriters were not entitled to sue in their own name, but must have sued in that of their owner. *The John Bellamy*, L. R., 3 A. & E. 129. See also *The Regina del Mare*, Br. & L. 315.

the law respecting the subject-matter insured (*k*). If the ship, therefore, notwithstanding the abandonment, proceeds and earns freight, that portion of it which is earned after the abandonment belongs to the underwriter (*l*). If the freight be not divisible, the whole passes to the underwriter on the ship, even although there be a separate insurance on the freight, and the latter is abandoned to the insurers of it at the same time as the ship is abandoned (*m*). But where a shipowner who abandons has carried in the ship goods on his own account, nothing in the nature of freight for the carriage of these goods previously to the abandonment passes to the abandonnee (*n*).

Where a ship is abandoned before the voyage is completed, and the cargo is transhipped and carried to its destination by another vessel, the underwriters are not entitled to the freight earned by the vessel in which the goods are transhipped, for the master in chartering her acts as agent for his owners and not for the underwriters (*o*).

(*k*) *Darrell v. Tibbets*, 5 Q. B. D. 563; *Randal v. Cockran*, 1 Ves. Sen. 98, and the cases cited, *supra*, p. 541, note (i).

(*l*) *Barclay v. Sterling*, 5 M. & S. 6; *The Scottish Marine Insurance Company v. Turner*, 1 Maoq. H. of L. C. 334. If *pro rata* freight is actually due before the abandonment, it belongs to the shipowner. *Luke v. Lyde*, 2 Burr. 882; 2 Arnould on Ins. 1151 (2nd edit.).

(*m*) *Case v. Davidson*, 5 M. & S. 79; *S. C.*, in error, 2 B. & B. 379; see also *Thompson v. Rowcroft*, 4 East, 34; *Leatham v. Terry*, 3 B. & P. 479; *M'Carthy v. Abel*, 5 East, 388; *Ker v. Osborne*, 9 East, 378; *Sharp v. Gladstone*, 7 East, 24; *Stewart v. The Greenock Marine Insurance Company*, 2 H. of L. C. 159; *Miller v. Woodfall*, 8 E. & B. 493. It has been observed by Mr. Chancellor Kent (3 Kent Com. 334, note), that the marginal note to *Case v. Davidson* is incorrect in stating that the underwriter was held to be entitled to the freight earned subsequently to the abandonment, since it appears by the report that the Court held that he was entitled to the whole freight. But the expression "freight earned subsequently to the abandonment," would seem to mean freight becoming due after the abandonment; and in the case in question, the whole of the freight became due after the abandonment, although part of it then became due in

respect of that portion of the voyage which had been performed before the abandonment. In this sense, the terms correctly express the rule in England, which is, that the contract as to the freight must be looked to, and that if by this contract the whole becomes due after the abandonment, there can be no distribution of it *pro rata itineris* between the underwriters on ship and freight. In the United States, however, a more equitable rule is adopted. On an accepted abandonment of the ship, the freight is apportioned *pro rata itineris*, that is to say, that portion of it which would have been earned previously to the disaster (if the contract had made the freight divisible), is retained by the shipowner, or his representative the insurer on the freight, and the remainder goes to the insurer on the ship. See *The United Insurance Company v. Leno*, 1 Johns. (American) Rep. 377; 2 *ib.* 443; and the other cases cited, 3 Kent Com. 333, and Phillips on Ins. c. 17, s. 17, where the continental authorities on this subject are mentioned. As to the passing of freight on a mortgage of a ship, see *ante*, p. 61, and *Gardner v. Cazenove*, 1 H. & N. 423.

(*n*) *Miller v. Woodfall*, 8 E. & B. 493.

(*o*) *Hickie v. Rodocanachi*, 4 H. & N. 455.

Where the ship and freight are separately insured, and the ship, although abandoned as a total loss, earns freight which passes to the underwriters on the ship, the owner cannot recover against the underwriters on freight; for the freight, in fact, has been earned, and the right of the underwriters on the ship to claim it arises not from a peril of the sea, but from the election made by the shipowner to abandon the ship (*p*).

In cases of abandonment, the parties who are entitled to the ship or freight take them charged with the necessary expenses resulting from the loss (*q*); but not with incumbrances which are unconnected with the casualty which caused the loss. Nor are they liable to third parties for the carrying out of the charter-party, or contract under which the ship is freighted (*r*).

Upon a valid abandonment the master becomes as to the property abandoned the agent of the insurer, and it is his duty to act with good faith, care, and diligence, for the protection and recovery of the property (*s*). The assured are not, after abandonment, bound by the acts of the master, unless they subsequently adopt them. In one case, indeed, it was held at Nisi Prius, that the assured were liable for stores supplied to the vessel by the order of their supercargo after an abandonment (*t*).

Agency of master for underwriters on abandonment.

The settlement between the assured and the underwriters of the amount to be paid when a loss has occurred, and of the proportion to be borne by each underwriter, is known by the term *adjustment*. The principles upon which these payments are calculated vary according to the usage of different mercantile countries. In England, they have been tolerably well determined, either by positive decision, or by usage established by the long acquiescence of merchants and underwriters in a particular practice (*u*).

If the policy be a valued policy, and the loss total, the whole sum named in the policy is payable. If the loss be total

(*p*) *Scottish Marine Insurance Company v. Turner*, 1 Macq. H. of L. Cases, 334.

(*q*) *Sharp v. Gladstone*, 7 East, 24; *Barclay v. Stirling*, 6 M. & S. 6.

(*r*) See the observation of Lord Ellenborough in *McCarthy v. Abel*, 5 East, 393; Phillips on Ins. c. 17, s. 15; 2 Arnould on Ins. 1181 (2nd edit.).

(*s*) See 3 Kent Com. 331, and the argument in *Cammell v. Sewell*, 3 H. &

N. 617, and *ante*, p. 159.

(*t*) *Mitchell v. Glennie*, 1 Stark. 230; and see *ante*, p. 95.

(*u*) As to the meaning of the clause "to pay general average as per foreign statement, if so made up, see *Harris v. Scaramanga*, L. R., 7 C. P. 481; *Mavro v. The Ocean Marine Insurance Company*, L. R., 10 C. P. 414; and *supra*, p. 492, note (*g*).

Where policy
valued policy.

of a portion only of the cargo, such a proportion only of the sum named in the policy as the actual value of the goods lost bears to the actual value of the whole cargo is payable. If the loss be partial, the value in the policy must be taken as the basis of the adjustment, and the sum payable bears the same proportion to the whole value in the policy, as the price of the damaged goods bears to the price of sound goods of a similar character at the port of delivery. Thus, if the damage to the goods be 50 per cent., the insurer pays, not half of the price of sound goods at the port of delivery, but half the value at which the goods are estimated in the policy (v).

In cases of
open policies
on ship.

The adjustment in the case of an open policy proceeds on somewhat different principles. If the subject-matter of the insurance is a ship, and the loss is partial, much difficulty would arise in calculating the actual benefit derived by the owner from the substitution of new materials for old in repairing the vessel.

Rule of one-
third new
for old.

To obviate this, the arbitrary but convenient rule has generally been adopted of making the insurer liable to the amount of two-thirds only of the cost of repair, deducting, as it is said, one-third new for old (w). This is, however, a rule rather of convenience and custom than of law, and does not apply in all cases (x). Thus, it does not apply to a ship on her first

(v) See *Lewis v. Rucker*, 2 Burr. 1167; *Goldemid v. Gillies*, 4 Taunt. 803; the judgment in *Usher v. Noble*, 12 East, 646, and *Forbes v. Aspinall*, 13 East, 327; *The North of England Iron Steamship Association v. Armstrong*, L. R., 6 Q. B. 81; *Williams v. The North China Insurance Company*, 1 C. P. D. 766. See also *Tobin v. Harford*, 13 C. B., N. S. 791, affirmed Cam. Scacc., 17 C. B., N. S. 528, cited *ante*, p. 459, note (k), where the rule laid down in the text was recognized, although, under the peculiar circumstances of that case, it did not admit of being applied. A practice has been acted upon by English underwriters in cases in which the policy is valued, and the loss an average loss, which is called "opening the policy;" that is, to disregard the agreed value named in the policy, and also to pay upon the value of the goods at their port of destination and not at their port of loading. The first of these rules is clearly wrong, both in principle and on authority. See the cases cited above,

and for an explanation of how the error probably arose, 1 Arnould on Ins. 358 (2nd edit.); as to the second, see the authorities cited *post*, p. 545, note (a), which show that even were it right to reject the agreed value, the value of the goods at their port of loading must be taken as the basis. As between several underwriters, however, who, standing in the place of their insurers, are contributing to an average loss, it is correct to take the value of the goods at the port of destination.

(w) *Pvingdestre v. The Royal Exchange Assurance Company*, R. & M. 378. Where a shipowner elects to repair, the amount he is entitled to recover, may, in the case of an old ship, notwithstanding the application of this rule, exceed the amount which would be payable on a total loss, with benefit of salvage; *Lohre v. Ditcheson*, 2 Q. B. D. 501; 3 Q. B. D. 501; 4 App. Ca. 755.

(x) *Ibid.*; and see *Lidgett v. Secretan*, L. R., 6 C. P. at p. 627.

voyage (*y*); nor are the underwriters entitled to make this deduction in settling with the shipowner if the ship, through their default in refusing to pay for repairs which they have directed, is sold by the parties who have advanced the money to repair her, and is never returned to the free possession of the owner (*z*).

If the insurance by open policy be upon goods, and the loss total, the assured is entitled to recover, not the amount for which the goods would have sold at their port of destination, but the amount at which they were invoiced at the loading port, together with the premium of insurance and commission (*a*). It has been doubted whether a payment made upon the shipment of goods can be added to their price, so as to form part of their value under an open policy. Such a payment is not, it has been said, properly freight, but the price of the privilege of putting the goods on board the ship, in order to have the opportunity of their being conveyed to the place of her destination (*b*). Where payments were made by the agent of the assured at a foreign port where goods were shipped, for port charges and other incidental expenses, in accordance with the terms of the charter-party under which the assured had the use of the ship, it was held that these sums could not be recovered from the underwriters under a policy on merchandize, since the money was not freight, nor had it any distinct relation to the goods shipped (*c*). If the loss be partial only the amount payable is ascertained by taking the difference between the selling price at the port of delivery of the damaged goods, and the price which they would have fetched there if sound, and the underwriter pays the same proportion of the estimated value of the goods, that is to say, of their invoice price, adding to it the

In cases of open policies on goods.

(*y*) *Fenwick v. Robinson*, 3 C. & P. 323; *Pirie v. Steele*, 2 M. & Rob. 49; *S. C.*, 8 C. & P. 200. See the latter case, also, as to what is a first voyage within the meaning of this rule.

(*z*) *Da Costa v. Neunham*, 2 T. R. 407.

(*a*) *Usher v. Noble*, 12 East, 639; *Langhorn v. Allnutt*, 4 Taunt. 511. The same rule has been acted upon in America. See 3 Kent Com. 336; Phillips on Ins. c. 16, s. 3. And in France, see Emerigon, vol. i. p. 262: "En fait de prêt à la grosse et d'assurance on ne fait point

attention à la valeur des effets au temps de leur perte, mais seulement à ce qu'ils valaient au temps de leur chargement." See also the Code de Commerce, Art. 339, where it is said, "L'estimation en est faite suivant le prix courant au temps et au lieu du chargement, y compris tous les droits payés et les frais faits jusqu'à bord."

(*b*) Per Lord Tenterden in *Winter v. Haldimand*, 2 B. & Ad. 659.

(*c*) *Winter v. Haldimand*, 2 B. & Ad. 649.

premium and commission (*d*). In this way the loss is computed on the gross proceeds of the goods. To calculate it according to their net proceeds would be erroneous, for the underwriter ought not to bear any loss from fluctuation of markets, or port duties, or charges after the arrival of the goods at their port of destination (*e*). Although the underwriter is not liable as for a total loss, beyond the amount for which he has subscribed the policy, it has been held that he may be liable for money expended in necessary repairs to the ship, or about her defence and recovery before the total loss, notwithstanding the money so expended may exceed his subscription (*f*).

In policies on freight.

Freight is seldom insured by an open policy; when it is, the loss is adjusted according to the custom at Lloyd's by paying the amount of the gross freight; and although the assured thereby recovers more than an indemnity, the usage has been upheld by a Court of law (*g*).

Interest.

It was considered that the assured could not recover interest upon the sum insured (*h*), unless indeed he had made a demand of the money, and informed the underwriter that interest would be required (*i*). But now the jury may, in actions on policies of assurance, give damages in the nature of interest, over and above the sum recoverable on the policy (*k*).

How and by whom made.

The adjustment on policies is usually settled on behalf of the assured by their agents or brokers. The agent or broker who had authority to subscribe the policy has also power to adjust it (*l*); and where it was shown that an agent had been in the habit of underwriting policies and settling losses, it was held

(*d*) See *Usher v. Noble*, 12 East, 639; *Waldron v. Coombe*, 3 Taunt. 162; *Cator v. The Great Western Insurance Company of New York*, L. R., 8 C. P. 652; and *Stevens on Average*, 118, 131.

(*e*) *Johnson v. Sheddon*, 2 East, 581; *Hurry v. The Royal Exchange Assurance Company*, 3 B. & P. 308; and see per Buller, J., in *Dick v. Allen*, 1 Park on Ins. 167.

(*f*) *Le Cheminant v. Pearson*, 4 Taunt. 367. It appears that properly these sums are recoverable as money paid under the clause of the policy which authorizes the assured to labour for the recovery of the property insured. See *supra*, p. 490; *Ib.*, and *Livie v. Janson*, 12 East, 655; *Stewart v. Steele*, 5

S. N. R. 927. See as to the mode of proving a partial loss, *Drake v. Merryatt*, 1 B. & C. 473.

(*g*) *Palmer v. Blackburn*, 1 Bing. 61.

(*h*) *Kingston v. M'Intosh*, 1 Camp. 518.

(*i*) *Bain v. Case*, M. & M. 262.

(*k*) 3 & 4 Will. 4, c. 42, s. 29.

(*l*) *Richardson v. Anderson*, 1 Camp. 45, note. The authority of an agent to underwrite policies is often limited to a particular amount; and when this is so, if the agent exceeds his authority, the contract cannot be divided; and the principal is not bound even to the extent to which he has authorized his agent to sign; *Baines v. Ewing*, L. R., 1 Ex. 320.

that he might refer the dispute respecting the adjustment to arbitration (*m*). It has been said that if a broker keeps the policy in his hands, it will be presumed that he promised to collect the sums due from the underwriters upon the happening of a loss (*n*).

Where a broker has received credit in account with the underwriter for a loss, he is liable to his principal for the amount; and if the underwriter's name has been erased from the policy, the broker, having deprived his principal of all remedy against the underwriter, can dispute neither the underwriter's liability for the loss, nor his own receipt of the sum insured (*o*). Where a broker took a bill from the underwriter for the balance of account due to the broker, including the amount of the loss, and the bill was made payable at a later date than that at which the loss would have been payable in cash, it was held that the assured might recover for money had and received against the broker, although the bill was dishonoured (*p*).

Whether, however, the underwriter is discharged, as against the assured, by a settlement in account with his broker, is a question which has been frequently discussed. In one of the earliest cases on the subject, the underwriter credited the broker with the sum due on the policy, but, instead of paying it, set it off against the account of premiums due by the broker to him on other policies to which the assured was not a party. It was proved that it had been the practice at Lloyd's for many years thus to settle losses; but the Court held that the broker was only entitled to receive payment in money, and that no usage could sanction a course of business which they thought amounted to a practice of paying the debt of one person with the money of another (*q*). Upon another occasion, the broker, after the adjustment, credited himself in account with the underwriter for the loss, and in an account which he transmitted to the assured, debited himself for the same amount. The assured drew on the broker for the balance due to him on that account; the broker accepted the bill, but becoming afterwards bankrupt, the bill was

Effect of
usage of
Lloyd's on
settlement of
losses.

(*m*) *Goodson v. Brooke*, 4 Camp. 163.

(*n*) See *per* Lord Ellenborough in *Bousfield v. Cresswell*, 2 Camp. 646.

(*o*) *Andrew v. Robinson*, 3 Camp. 199.

(*p*) *Wilkinson v. Clay*, 6 Taunt. 110; S. C., 4 Camp. 171.

(*q*) *Todd v. Reid*, 4 B. & A. 210; see the observation on this case by Parke, B., in *Stewart v. Aberdeen*, 4 M. & W. 224. The report is incorrect in stating that there was any settlement in account between the broker and underwriter.

dishonoured. The policy remained in the broker's hands uncanceled. The Court held that the underwriter was not discharged (*r*).

In two subsequent cases, attempts were made to establish the usage in question, but the underwriters failed to make out that the assured knew of the custom, or had assented to such a mode of settling (*s*). In one of these cases the name of the underwriter had actually been erased from the policy, but as that had not been done with the assent of the assured, the Court held that the underwriter's liability was not affected by it (*t*).

In all the above cases, except one (*u*), the right of the underwriters to settle with the assured by an allowance in account with the broker was claimed irrespectively of the state of accounts between the assured and his broker. In the single instance where this was not so, the fact that the name of the underwriter remained on the policy had great weight with the Court. In the latest important case on this subject (*x*), which appears to have shaken the strict rule laid down in the earlier cases, the underwriter pleaded that a settlement by allowance in account between him and the brokers had been made according to the usage, and with the assent of the assured. It appeared that the loss had been settled between the brokers and the underwriter, according to the practice above described, and that the subscription of the underwriter had been struck out, and that the brokers had advised the assured that the loss was about to be settled, and credited him with the amount on account, and that he had drawn bills on them for the amount. The usage at Lloyd's was proved, as well as the assured's knowledge of it. The Court held that there was evidence to support the substance of the plea, and that the underwriter was discharged; and they

(*r*) *Russell v. Bangley*, 4 B. & A. 396.

(*s*) *Bartlett v. Pentland*, 10 B. & C. 760; *Scott v. Irving*, 1 B. & Ad. 605. In *Bayliffe v. Butterworth*, 1 Ex. 425, a question arose as to the usage amongst Liverpool share brokers, and it was doubted by Parke and Rolfe, BB., whether a principal employing a broker to contract for him was not bound by a contract made in the usual way, although he was not cognizant of the usage. In *Sweeting v. Pearce*, 7 C. B., N. S. 449, S.C. in Cam. Scacc., 9 C. B., N. S. 534, it was held that a

person who employed an insurance broker was not bound by a custom as to the settlement of a loss at Lloyd's which was generally known to merchants and shipowners, but which was found by the jury not to be known to the broker's principal. See also *ante*, p. 466; *Bayley v. Wilkins*, 7 C. B. 886, and *Westropp v. Solomon*, 8 C. B. 345.

(*t*) *Bartlett v. Pentland*, *ubi supra*.

(*u*) *Russell v. Bangley*, *ubi supra*.

(*x*) *Stewart v. Aberdeen*, 4 M. & W. 211.

said that where a mercantile agent is employed to receive money for another in the general course of his business, and the known general course is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with monies actually received, the rule that an agent has no authority to pay a demand of his own upon the debtor by a set-off in account with him cannot properly be applied; but that it must be understood, that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal (y).

If the policy is under seal, and is effected in the name of the broker, it is clear that the underwriter is discharged by setting off his debt against premiums due from the broker to him; for the contract is in law made, not with the assured, but with the broker, who alone can sue upon it as trustee for the assured; and if there is a defence against the trustee, there is also, at law, a defence against the person for whom he is suing (z).

There is no right to deduct a loss on a policy underwritten by a testator with a broker, from the amount due from the broker to the executors for premiums (a).

An adjustment made and assented to by the underwriter is *prima facie* evidence of his liability on the policy, and of the amount due (b). But as it does not alter the position of the parties or form a substantive contract on a new consideration, it produces no further effect than shifting the onus of proof (c). It may, therefore, be rebutted by showing that the adjustment was obtained through fraud, or was made under a mistake of fact, or even of law (d), or through an unfair suppression of any material circumstance (e). If, however, the amount due upon a loss has been actually paid, with a full knowledge of the facts,

(y) See the judgment in *Stewart v. Aberdeen*, 4 M. & W. 228.

(z) *Gibson v. Winter*, 5 B. & Ad. 96.
(a) *Bockwith v. Bullen*, 8 E. & B. 683.

(b) 1 Park on Ins. 193; and see per Lord Ellenborough in *Shepherd v. Chewter*, 1 Camp. 275, and *Luckie v. Bushby*, 13 C. B. 861.

(c) See the note to *Shepherd v. Chewter*, *ubi supra*, and *Herbert v. Champion*, 1 Camp. 134.

(d) *Christian v. Coombe*, 2 Esp. 489; *Sheriff v. Potts*, 5 Esp. 96; and see the observation of Sir J. Mansfield, C. J., in *Steel v. Lacy*, 3 Taunt. 285; *Reynor v. Hall*, 4 Taunt. 725.

(e) *Shepherd v. Chewter*, *ubi supra*.

it cannot be recovered back upon the ground that it was paid under a mistake of law (*f*).

Where an underwriter paid a loss to a broker who had effected the policy as agent for a shipowner, as the underwriter knew, and afterwards, having discovered that the policy was voidable upon the ground of concealment, he sued the broker to recover back the amount which had in the meantime been paid over by the latter to his principal, it was held that the amount of the loss could not be recovered back from the broker; and further, that it made no difference whether the money had been actually paid over to the principal, or had merely been allowed in account, or expended for him by his direction (*g*).

When a policy is adjusted it is a common practice for the broker of the underwriter to give to the assured or his agent his own note, called a credit note, for the amount of the loss, payable in a month. This does not, however, affect the liability of the underwriter, who, should the broker become insolvent during the month, must pay the loss to the assured (*h*).

REMEDIES ON POLICY.

Reference to
arbitration,
how far a
bar.

Payment of a loss is enforced by an action on the policy, which may be resorted to, notwithstanding an express provision in the policy that all disputes shall be referred to arbitration (*i*). But it has been decided in the House of Lords, that, although where a right of action has accrued, the parties cannot by contract provide that the Courts shall not have jurisdiction to award and enforce damages in respect of it, yet, that there is no objection to a condition in a policy of insurance stipulating that if any difference shall arise it shall be referred to arbitration to settle the amount payable, and that the obtaining the decision of the arbitrators shall be a condition precedent to the maintaining an action; for this is in fact only a qualified contract of insurance, and such a provision operates to prevent any cause of action whatever from arising until the amount to be paid has been ascertained by the arbitrators (*k*).

(*f*) *Bilbie v. Lumley*, 2 East, 469. See also *Kelly v. Solari*, 9 M. & W. 54; *Higgs v. Scott*, 7 C. B. 63.

(*g*) *Holland v. Russell*, 1 B. & S. 424; *S. C.* in Cam. Scacc., 4 B. & S. 14.

(*h*) *Macfarlane v. Giannocopulo*, 3 H. & N. 860.

(*i*) *Kill v. Hollister*, 1 Wils. 129. See also *Thompson v. Charnock*, 8 T. R. 139;

Harris v. Reynolds, 7 Q. B. 71; *Scott v. Avery*, 8 Ex. 487; *Horton v. Sayer*, 4 H. & N. 643.

(*k*) *Scott v. Avery*, 5 H. of L. Cases, 811; *S. C.*, Cam. Scacc., 8 Ex. 497; *Edwards v. The Abirayron Mutual Ship Insurance Society*, 1 Q. B. D. 563, 579; *Tredwen v. Holman*, 1 H. & C. 72, and *Braunstein v. The Accidental Death In-*

Where the policy is effected by one of several owners who is named in it, the other parties really interested in the subject-matter of the insurance may sue on it jointly with him, although the policy is by deed, and they are not named in it, provided they are sufficiently designated in it, that is to say, if the policy shows that there are other parties interested, and the covenants are made with the "assured" (l). If the policy is not under seal, the action may be brought in the name either of the principal or of the agent who effected it (m).

Right of persons interested to sue.

A recent statute, the 31 & 32 Vict. c. 86 (n), confers upon the assignees of policies of marine insurance of every description the power of suing in their own names. Sect. 1 of this act enacts that whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected.

Right of assignee of policy to sue.

By sect. 2 of the same act, it is declared lawful to make any assignment of a policy of insurance by endorsement on the policy in the words or to the effect set forth in the schedule to the act.

And by sect. 3, it is declared that "for the purposes and in the construction of the Act the term 'policy of insurance' or 'policy' shall mean any instrument by which the payment of money is assured or secured on the happening of any of the contingencies named or contemplated in the instrument of assurance known as 'Lloyd's Policy,' or in any other form adopted for insuring ships, freights and goods carried by sea" (o).

insurance Company, 1 B. & S. 782; 31 L. J., Q. B. 17; *Dawson v. Fitzgerald*, L. R., 9 Ex. 7; 1 Ex. D. 257. See also the Common Law Procedure Act, 1854, s. 11.

(l) *The Sunderland Marine Insurance Company v. Kearney*, 16 Q. B. 925. See also *Green v. Horne*, 1 Salk. 197; and 1 Chit. Plead. 4. It is a common practice for policies by deed poll to be effected by agents or brokers, "for and in the names of all persons to whom the same doth appertain," &c.

There appears to be no doubt that on such policies the principals may sue the underwriters. See Rules of the Supreme Court, Ord. XVI. r. 9. *De Hart v. Stevenson*, 1 Q. B. D. 313.

(m) 1 Chit. Plead. 8; *Browning v. The Provincial Insurance Company of Canada*, L. R., 5 P. C. 263; *The Provincial Insurance Company v. Ledue*, L. R., 6 P. C. 224, *ante*, p. 333.

(n) Appendix, p. ccciii.

(o) See an assignment can be made under this statute after loss, *Lloyd v.*

To an action by the assignee of a policy the underwriters cannot set off a debt due to them from the assured for premiums on policies effected by the assured since the date of the assignment, such set-off not being a "defence" within the statute (o).

Underwriters severally liable.

It is hardly necessary to observe, that the several underwriters are not jointly, but severally, liable on their subscriptions.

Particulars of sums insured and lent on bottomry.

It is provided by the 19 Geo. 2, c. 37, s. 6, that in all actions on any policies of insurance the plaintiff shall within fifteen days after notice in writing declare in writing what sums he hath assured, or caused to be assured, in the whole and what sums he hath borrowed on respondentia or bottomry for the voyage, or any part of the voyage, in question in such actions.

Inspection of documents in actions on policies.

In an action on a policy the defendant is entitled both under the old and the present practice to an inspection of all papers in the possession of the plaintiff relative to the matters in issue, including letters between the captain and the plaintiff (p).

Consolidation rule.

Where two or more actions are brought against different defendants on the same policy (q), or the same question is involved in several actions on different policies (r), the Court will, on the application of the defendants at any time after appearance, grant a consolidation rule staying the proceedings in all the actions but one, upon the defendants undertaking to be bound in the others by the result of that one. This rule is considered as a favour to the defendants; the Courts have not, therefore, usually granted it except with the consent of the plaintiff (s). The defendant is bound, under the terms of the

Fleming, L. R., 7 Q. B. 299. As to what is an assignment within the statute, see *The North of England Pure Oil Cake Company v. The Archangel Marine Insurance Company*, L. R., 10 Q. B. 249.

(o) *Pollas and Company v. The Neptune Marine Insurance Company*, 5 C. P. D. 34.

(p) *The West of England and South Wales District Bank v. The Canton Insurance Company*, 2 Ex. D. 472; *Rayner and another v. Ritson*, 6 B. & S. 888; 35 L. T., Q. B. 69. This was an action for a constructive total loss, but the practice is the same wherever the

documents, the inspection of which is sought, are relevant to the issue in the cause. See also *Fraser v. Burrows*, 2 Q. B. D. 624.

(q) *Hollingsworth v. Brodrick*, 4 A. & E. 646; Arch. Pract. (1879), pp. 1085, 1086; Chitty's Forms (1879), p. 223.

(r) *M'Gregor v. Horsfall*, 3 M. & W. 320; *Ohrly v. Dunbar*, 5 A. & E. 824; see also *Sharp v. Lethbridge*, 4 M. & Gr. 37.

(s) *Doyle v. Anderson*, 1 A. & E. 635; *M'Gregor v. Horsfall*, 3 M. & W. 320. In *Hollingsworth v. Brodrick*, 4 A. & E. 646, the Court granted the

ordinary rule, by the verdict in the first action, if it is satisfactory to the judge. But the Court will not, without consent, bind the plaintiff by the result of the first action (*t*); nor will the plaintiff, after the ordinary rule, be restrained from bringing a second action, although he has not paid the costs of the first (*u*).

A claim against the assured for premiums due from them, could not be set off in an action on the policy for a partial loss even if it had been adjusted; for in either case the action is only for unliquidated damages. Such a claim may now form the subject of a counter-claim (*x*). Counter-claims by underwriters.

Policies underwritten by joint stock co-partnerships and by corporations, often contain stipulations that the funds of the body shall alone be subject to make good the loss, and that no shareholder shall be liable to be charged by reason of the policy, beyond the amount of his shares in the public stock. Effect of proviso that funds of company shall be alone liable, and that members shall be liable only to extent of their shares.

Where an action was brought against a corporation on a policy which contained a provision to this effect, and also a covenant that the funds should be liable and should be applied to make good the loss, it was held that this amounted to an absolute covenant by the corporation to pay the sum insured if a loss was incurred, and that it was not necessary to aver in the declaration that the funds were sufficient to meet the demand (*y*). It is very doubtful whether the deficiency of funds, if pleaded, is any defence in such a case to an action against a corporate body. The indication of the source out of which the claim is to be paid, seems rather to impose a duty on the insurers to raise the fund, than to make its existence a condition precedent to their liability (*z*). Where such a policy was granted by a joint stock company not registered, and the action

rule, although the plaintiff objected, but it was afterwards drawn up by consent. See also Ord. LI. r. 4 of the Rules of the Supreme Court. *Amos v. Chadwick*, 4 Ch. D. 869.

(*t*) *Doyle v. Anderson*, 1 A. & E. 635.

(*u*) *Doyle v. Douglas*, 4 B. & Ad. 544.

(*x*) *Castelli v. Boddington*, 1 E. & B. 66, 879; *Luckie v. Bushby*, 13 C. B. 864. See also *Beckwith v. Bullen*, 8 E. & B. 683. The Judicature Act, 1873, s. 24, subs. 3, and Rules of the Supreme Court, Ord. XIX. r. 3.

(*y*) *The Sunderland Marine Insurance Company v. Kearney*, 16 Q. B. 925. It is to be observed, that this was not the case of a company completely registered under the 7 & 8 Vict. c. 110, but of a corporate body the individual members of which could not be charged personally, the corporate fund alone being liable.

(*z*) *The Sunderland Marine Insurance Company v. Kearney*, 16 Q. B. 925; *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 5 C. B. 440.

was brought against the subscribing directors, it was held, on a declaration which averred the sufficiency of the funds (an averment which appears to have been necessary), that the defendants were personally and jointly liable (a).

If the members of such a co-partnership who sign the policy have power to bind their co-partners, it is not necessary to sue the members who signed; the other shareholders may be sued, and are liable to the extent of their shares (b). It was held, indeed, where a judgment was recovered against a company completely registered under the 7 & 8 Vict. c. 110, upon a policy containing a stipulation that the proprietors should not be liable beyond the amount of their shares, but that the company's capital stock alone should be liable, that the plaintiff was not entitled to issue execution against an individual shareholder who had not signed the policy (c).

Where such a policy was granted by a joint stock company which was not registered under the Joint Stock Companies' Act, it was held, that, although the funds of the company were sufficient to pay the amount of the loss, shareholders who had not signed the policy were not liable to be sued jointly on it. It would seem, however, that if the directors who sign the policy have authority to do so, the shareholders who do not sign are liable to be sued severally, each to the amount of his unpaid up capital in the company; and that the liability of the directors, and in particular of those who sign the policy, may be more extensive, since they have the funds of the company in their hands, and therefore they may be considered to promise jointly to apply them towards the payment of the losses. It is, however, difficult to see how the contract of the directors, or of those who sign the policy, can be different from that of the other

(a) *Dawson v. Wrench*, 3 Ex. 359. The question arose in this case on demurrer, and the declaration alleged in substance that the defendants contracted jointly. Unless, however, a distinction can be supported between the liability of the directors who actually sign the policy, and that of the other shareholders, it would appear that the contract was not, in fact, joint. See *Hallett v. Dowdall*, 18 Q. B. 2.

(b) *Reid v. Allan*, 4 Ex. 326. See also *Gray v. Gibson*, L. R., 2 C. P. 120. The liability is to the extent of their unpaid up shares. See the allegations in the declaration in this case, and

Hallett v. Dowdall, *ubi supra*.

(c) *Halkett v. The Merchant Traders' Ship Loan and Insurance Association*, 3 Q. B. 960; *Hassell v. The Merchant Traders' Ship Loan and Insurance Association*, 4 Ex. 525; *In re the Athenæum Life Assurance Company*, 4 K. & J. 517; 25 L. J., Ch. 829. It is difficult to reconcile these cases with the rule laid down in *Dawson v. Wrench*, and *Hallett v. Dowdall*, *ubi supra*, unless a distinction can be made as to the meaning of these contracts when entered into by registered and unregistered joint stock companies.

shareholders, if the policy has been issued under the authority of all the shareholders (*d*).

Where policies are effected by means of mutual assurance associations or clubs, as they are commonly called, special rules are provided for the payment of claims, such payments being usually effected by the managers drawing bills on the members, and when this is so, the members cannot be sued individually on the policy (*e*).

Payment of claims by assurance clubs.

As the premium is the consideration paid to the underwriter for assuring a risk, it must, where that risk never commences, be returned. Thus, if the policy be on goods, and none are shipped, the premium must be returned, for the risk never commenced (*f*). So, if a ship be insured for a particular voyage, and she sails on that voyage in an unseaworthy state, but without fraud on the part of the assured (*g*), or if a policy be effected on an enemy's goods before the commencement of hostilities is known (*h*), or if at the time of insuring a ship on her voyage she has arrived, and the underwriter knows it (*i*), in all these cases, as the policy never attaches, and no risk is incurred, the premium must be returned. So where before the risk commences, there is a breach of warranty by the assured which prevents the liability of the underwriters from attaching, as where the ship is warranted to sail with convoy, and does

RETURN OF PREMIUM. Where risk never commences.

(*d*) *Hallett v. Dowdall*, 18 Q. B. 2; see also *In re the Professional Life Assurance Company*, L. R., 3 Eq. 668. There was in this case considerable difference of opinion among the judges as to the construction and effect of the contract. As far as the decisions have gone in cases of this description, the Courts appear to have decided (1), that in contracts by corporations these restricting clauses have no effect; (2), that in contracts by joint stock companies not registered, they limit the contract, so that shareholders who have not executed the policy cannot be sued jointly on it; and (3), that where they occur in contracts by joint stock companies completely registered, they limit the execution, by depriving the assured of the right of issuing execution against individual shareholders, which he otherwise would have had under the 7 & 8 Vict. c. 110. The difficulties which have arisen in those cases have resulted from an attempt to create a

partnership contract with a limited and varying liability in the different members.

(*e*) *Redway v. Suceeting*, L. R., 2 Ex. 401. As to the constitution of and insurance by these associations, see *ante*, p. 443, note (*e*); and *Edwards v. The Abirayron Mutual Ship Insurance Society*, L. R., 1 Q. B. D. 563; *Evans v. Hooper*, 1 Q. B. D. 45; and *Wood v. Wood*, L. R., 9 Ex. 190.

(*f*) *Martin v. Sitwell*, Show. 156.

(*g*) *Penson v. Lee*, 2 B. & P. 330; and see the judgment of Buller, J., in *Lowry v. Bourdieu*, 2 Doug. 471.

(*h*) *Oom v. Bruce*, 12 East, 225.

(*i*) See the judgment of Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1909. This amounts to a fraud on the part of the underwriter. It has been doubted whether, if both parties are ignorant of the ship's arrival, and the policy is "lost or not lost," the premium could be recovered. See 2 Park on Ins. 562.

not (*k*), or the policy is avoided by a misrepresentation made by the assured without fraud, and the risk never attaches, the premium is returnable (*l*).

Or is apportionable.

Although the premium paid be entire, the assured will still be entitled to receive back a portion of it, if the risk for which it is paid can be apportioned. Thus, where a ship insured from London to Halifax, to depart with convoy from Portsmouth, was unable to proceed beyond the latter place, as when she reached it the convoy had sailed, and an usage was proved to return part of the premium in such a case, the Court held that the premium might be divided into two distinct parts, relatively, as it were, to two voyages, and that that proportion of it which covered the risk not run, ought to be returned (*m*). If, however, the risk is entire, and has once commenced, there can be no apportionment or return of the premium; although it be estimated, and the risk depends upon, the nature and length of the voyage (*n*). Thus, where a ship was insured "at and from London to any port or ports for twelve months, at £9 per cent., warranted free from capture," and the ship was taken within two months from her sailing, the Court held that the assured were not entitled to a return of any part of the premium (*o*). So, if the insurance is "at and from" a port, and the ship is seaworthy for lying in harbour, but when she sails on the voyage is unseaworthy for the voyage, the assured is not entitled to a return of the premium, for the risk has attached (*p*). For the same reason the premium is not returnable where a deviation takes place after the commencement of the voyage (*q*), even where the insurance is on freight as well as ship, and the deviation occurs before the goods are taken on board (*r*).

Where there is no interest.

Where the assured has no interest in the property insured, and

(*k*) *Stevenson v. Snow*, 3 Burr. 1237; *Long v. Allan*, 4 Doug. 276. See also the judgment of Lawrence, J., in *Christi v. Secretan*, 8 T. R. 198; *Colby v. Hunter*, Moo. & M. 81.

(*l*) *Feiss v. Parkinson*, 4 Taunt. 640; *Anderson v. Thornton*, 8 Ex. 425.

(*m*) *Stevenson v. Snow*, 3 Burr. 1237. See also *Meyer v. Gregson*, 2 Park on Ins. 588; *Rothwell v. Cooke*, 1 B. & P. 172.

(*n*) See the judgment of Lord Mansfield in *Tyrie v. Fletcher*, 2 Cowp. 668, and *Boehm v. Bell*, 8 T. R. 154.

(*o*) *Tyrie v. Fletcher*, 2 Cowp. 666. See also *Loraine v. Tomlinson*, 2 Doug. 585. In the latter case the premium was reckoned at so much per month, but that circumstance was held to make no difference. See also *Bermon v. Woodbridge*, 2 Doug. 781; and *Hoskins v. Holland*, 44 L. J., Ch. 273.

(*p*) *Annen v. Woodman*, 3 Taunt. 299. See also *Moses v. Pratt*, 4 Camp. 297.

(*q*) *Tait v. Levi*, 14 East, 481.

(*r*) *Moses v. Pratt*, *ubi supra*. The policy was a valued one.

effects the insurance without fraud, the premium is returnable, for the underwriters could not have been called upon to pay in case a loss had happened. Thus, where captors acting *bond fide* insured a prize in which, as it afterwards appeared, the Crown alone was interested, it was held that the premium must be returned (s). Where, however, the risk has been run, and the ship has arrived in safety, the premium cannot be recovered back by reason of a mere defect in the title of the assured. Thus, where, on an insurance of a ship and freight, the vessel, after her safe return and the earning of the freight, was seized under an Admiralty warrant issued at the suit of a person who claimed her and the freight, as the registered owner in this country, it was held that no return of the premium could be claimed (t).

It follows, from an application of the same principle, that in cases of *short interest*, or of *over insurance*, or *double insurance*, the underwriters are bound, to the extent of the over insurance, to return the premium; for no risk is incurred by them beyond the value of the property which is actually hazarded. Thus, where part only of the goods insured is shipped, the interest is said to be short, and a proportionate part of the premium is returnable (u). So, if profits on a certain amount of goods are insured, and only a part of them is shipped, a proportionate part of the premium must be restored for short profits (x).

In cases of short interest, double insurance, &c.

In cases of *double insurance*, a rateable return of the premium must be made (a).

Five policies of insurance were effected on the 12th of April, on a cargo of cotton then at sea, and on the 13th six policies more were *bond fide* effected at a lower premium. The amount insured by the two sets of policies together exceeded the value of the cotton, but the amount of the first five did not. It was held, that the assured were entitled to a return of the premium to the extent of the over insurance, but that it must be made rateably on the policies effected on the 13th, and on these only, since the underwriters of those effected on the 12th had incurred, although only for a short time, a risk to the extent of the whole amount insured by them (b).

(a) *Routh v. Tompson*, 11 East, 428.
(b) *M'Culloch v. The Royal Exchange Assurance Company*, 3 Camp. 406.

(u) *Stevens on Average*, 203.
(x) *Eyre v. Glover*, 16 East, 218.

(a) *Stevens on Average*, 204; 2 Arnold on Ins. 1226 (2nd edit.). See also *Morgan v. Stockdale*, 4 Ex. 615.
(b) *Fisk v. Masterman*, 8 M. & W. 166.

Where the insurance, however, is by a valued policy, the underwriters are not bound, if the goods intended to be covered by the policy are shipped, to return any part of the premium on the ground that the specified value exceeds the real value of the cargo (*b*).

Where there
is fraud or
illegality.

The premium is not returnable, even although the risk never commences, where the assured is guilty of fraud; as where, at the time of effecting the insurance, he knows, or the agent whom he employs to effect it knows, that the property insured is lost (*c*). If, however, the underwriter is guilty of fraud, as if, for instance, he knows when he underwrites the policy that the ship has performed safely the voyage insured, he is bound to return the premium (*d*).

When the contract of insurance is illegal, and the voyage has been performed, there is no return of the premium; for in these cases the rule applies *in pari delicto melior est conditio possidentis* (*e*). Mere ignorance of the law will not prevent the operation of this rule (*f*); but it is otherwise if the facts which constitute the illegality are not known to the parties at the time when the premium is paid, so that they contemplate a legal, not an illegal, voyage (*g*).

Where the risk has not commenced, and the contract is still open, so that the assured, by withdrawing from it, may restore the underwriter to his original position the premium may, it seems, be recovered back, even although the contract is illegal (*h*). It appears clear, however, that to enable the assured to recover the premium in this case, he must give notice to the underwriter before bringing the action of his intention to

(*b*) *Macnair v. Coulter*, 4 Brown's P. C. 450; 2 Arnould on Ins. 1225 (2nd edit.).

(*c*) *Tyler v. Horne*, 1 Park on Ins. 329; *Chapman v. Fraser*, *ib.* See also *Wilson v. Duckett*, 3 Burr. 1361. As to proceedings to cancel policies in cases of fraud, see *The London and Provincial Insurance Company v. Seymour*, L. R., 17 Eq. 85, and cases there cited.

(*d*) See the judgment of Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1909.

(*e*) See *Louvy v. Bourdieu*, 2 Doug. 468; 2 Park on Ins. 569, 575; *Andree v. Fletcher*, 3 T. R. 266; *Cowie v. Bar-*

ber, 4 M. & S. 16; *Wilson v. The Royal Exchange Assurance Company*, 2 Camp. 626; *Vandyck v. Hewitt*, 1 East, 96; the cases cited below; and *Allkins v. Jupe*, 2 C. P. D. 375, the case of a wager policy prohibited under 19 Geo. 2, c. 37.

(*f*) *Morck v. Abel*, 3 B. & P. 35; and the judgment of Buller, J., in *Louvy v. Bourdieu*, 2 Doug. 471.

(*g*) *Oom v. Bruce*, 12 East, 225; *Hentig v. Stanforth*, 6 M. & S. 122.

(*h*) See the judgment of Buller, J., in *Louvy v. Bourdieu*, *ubi supra*; *Tappenden v. Randall*, 2 B. & P. 467.

abandon the policy, and must withdraw formally from the illegal contract whilst a *locus penitentiæ* remains (i).

In most of the cases noticed above, the policies were silent as to the return of premium; it not unfrequently occurs, however, that the parties expressly stipulate that the premium shall be returned if a particular event happens; in these cases the right of the assured to a return of the premium depends upon the terms of the particular contract (k). In other cases, where the policy has contained no such stipulation, but an established usage on the subject has been proved, the assured have been held entitled to recover back the premium in accordance with it (l).

Where there are express stipulations.

(i) *Palyart v. Leckie*, 6 M. & S. 290. The decisions as to the right to recover the deposit on illegal wagers will be found to illustrate the principles mentioned above. See *Aubert v. Walsh*, 3 Taunt. 277; *Lancassade v. White*, 7 T. R. 535, a case which must be considered to be overruled by the later authorities, (see *Howson v. Hancock*, 8 T. R. 575; *Aubert v. Walsh*, and the judgment of Bayley, J., in *Hastelow v. Jackson*, 8 B. & C. 225); *Gatty v. Field*, 9 Q. B. 431; *Farney v. Hickman*, 5 C. B. 271; *Hampden v. Walsh*, 1 Q. B. D. 189; *Bateson v. Newman*, 1 C. P. D. 573. See also *Taylor v. Chester*, L. R., 4 Q. B. 309.

(k) Where the premium was to be returned if the ship was "sold or laid up," it was held that there must be such a permanent laying up as put an end to the policy. *Hunter v. Wright*, 10 B. & C. 714. See as to the effect of a stipulation that the premium is to be returned if the ship sails with convoy, *Audley v. Duff*, 2 B. & B. 111; *Simond v. Boydell*, 1 Doug. 268. In the latter case the policy was on goods, and the premium was returnable if the ship "sails with convoy and arrives;" it was held that the ship was bound to sail with convoy, but

not to arrive with convoy; and that it was sufficient that the goods arrived, although they did not arrive safely, there being no warranty as to their condition. "Arrived" means "at the ultimate port of destination." *Kellner v. Le Mesurier*, 4 East, 396; see also *Dalglish v. Brooke*, 15 East, 295; *Leevin v. Cormac*, 4 Taunt. 483. This would seem to apply to the case which commonly now occurs, in a time policy there is a stipulation for a return of premium "on arrival."

If the ship arrives, the premium must be returned, although she has been captured and re-captured, and the assured have been obliged to pay salvage. *Aguilar v. Rodgers*, 7 T. R. 421. Where the insurance is on goods, and the plaintiff recovers for a total loss, he cannot also recover for a return of premium for convoy, for the premium is added to the invoice price of the goods in calculating the total loss. *Langhorn v. Allnutt*, 4 Taunt. 511.

(l) *Long v. Allan*, 4 Doug. 276; *Stevenson v. Snow*, 3 Burr. 1237. See also *Baines v. Woodfall*, 28 L. J., C. P. 338, which was the case of a fire policy on a ship.

CHAPTER VIII.

HYPOTHECATION AND SALE.

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HYPOTHECA-
TION.

HYPOTHECATION is a contract of pledge, whereby, in consideration of money advanced for the necessities of the ship, the vessel, freight or cargo, or two, or all of these, are made liable for its repayment, provided the ship arrives in safety.

The contract is usually effected by an instrument in writing called a bottomry bond (a), by which the master binds himself in a penalty to repay the sum borrowed, and also professes to assign the ship and freight, or cargo, as the case may be; with a condition that the bond shall be void if the money secured be repaid within a certain time after the safe arrival of the ship at her port of destination. This instrument is generally executed under seal, or it may be merely in the form of a written agreement, signed by the master or owner (b). When the cargo

(a) It is so called because the keel or bottom of the ship, *pars pro toto*, is pledged. *Scarborough v. Lyus*, Latch, 252; *Noy*, 95; *Beawes*, Lex Merc. 117; and *The Atlas*, 2 Hagg. 53. See also generally Pritchard's Admiralty Digest, tit. *BOTTOMRY*; Williams and Bruce's Admiralty Practice, Ch. III.

(b) See *The Cecilia*, 5 P. D. 211; *The Eppis*, L. R., 6 A. & E. 2. Sometimes the hypothecation is effected by an instrument, not in the form of a bond, which is called a bottomry bill. See *The D. H. Bills*, 4 P. D. 32.

Where a bottomry bond contained a clause which provided that the obligation should be void if the obligor should pay, in consequence of the loss of the ship, such an average, as by custom would have become due on the salvage: it was held that this clause did not apply where the ship remained in specie, though constructively lost within the meaning of a policy of insurance. *The Great Pacific*, L. R., 2 P. C. 516; *Broomfield v. The Southern Insurance Co.*, L. R., 5 Ex. 192.

C. 1067 967
m. 2. - sample
m. m. j.
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Benny
Y.E. 581.

**No particular
form of con-
tract required.**

Comm. Art. 315. Where the money is advanced on *goods* the borrower is not discharged by the loss of the ship and cargo, unless he proves that he had goods on board to the extent of the money borrowed. *Ib.* Art. 329.

(e) *Justin v. Ballam*, 1 Salk. 34. See also the judgments of Lord Hardwicke in *Burton v. Snow*, 1 Ves. sen. 155, and of Lord Stowell in *The Gratitude*, 3 Rob. 255, and in *The Hero*, 2 Dods. 140. By the 7 Geo. 1, stat. 1, c. 21, s. 2, contracts made by English subjects upon loans by way of bottomry on ships in the service of foreigners designed to trade within the limits of the East India Company's charter, were made void. This act is repealed by the Statute Law Revision Act, 1867. See also *The India, Br. & L.* 221, where it was held that it was repealed by implication. By the 19 Geo. 2, c. 37, s. 6, loans on bottomry upon ships belonging to English subjects bound to or from the East Indies, were required to be made only on the ship or cargo, and to be so expressed in the bond. This section is now repealed by the Statute Law Revision Act, 1867.

The following copy of a bottomry bond on ship, freight and cargo will, however, show the nature of the provisions usually adopted.

Form of
bottomry
bond on ship,
cargo and
freight.

Know all men by these presents that I, master of the ship , of the port of London, am well and firmly bound unto , of , in the merchants, in the penal sum of of lawful British money, to be paid to the said , or their certain attorney or attorneys, executors, administrators or assigns, for which payment to be well and truly made, I bind myself, my heirs, executors and administrators, and also the said vessel, her tackle, apparel and furniture, and the freight to be earned on her now intended voyage from to , and also the cargo shipped on board the said vessel firmly by these presents sealed with my seal. Dated this day of , in the year of our Lord 18 .

Whereas the said vessel lately arrived at , from the port of aforesaid, and being in want of funds necessary to enable her to proceed on her voyage from aforesaid to aforesaid, whither she is bound, and now about to go, and without which funds she cannot proceed on her now intended voyage, and the said in order to be enabled to procure such necessary funds aforesaid, and for the lawful and necessary disbursements and expenses of the said vessel at aforesaid, hath requested the said to lend them the sum of for the aforesaid purposes, and the said hath accordingly lent the said sum for the aforesaid services on the hazard and adventure of the said vessel in her said intended voyage from to aforesaid.

Now the condition of the above obligation is such, that if the said vessel do and shall with all reasonable and convenient speed sail from aforesaid on her said intended voyage to aforesaid, and that without deviation (the perils, dangers, accidents and casualties of the seas and navigation excepted), and if the above-bounden , his heirs, executors or administrators, or the owners of the said vessel, do and shall within seven days after the said vessel shall arrive at aforesaid, well and truly pay or cause to be paid unto the said their attorney, executors, administrators or assigns, the said sum of of lawful British money, together with per cent. bottomry premium thereon, or if on the said voyage the

said vessel shall be utterly lost, cast away, or destroyed in consequence of fire, enemies, pirates, storms or other the unavoidable perils, dangers, accidents or casualties of the seas or navigation to be sufficiently shown or proved by the said , his executors or administrators, or by the owners of the said vessel, their executors or administrators, then the above-written bond or obligation to be void, otherwise to remain in full force and virtue.

Having signed two bonds of the same tenor and date, the one of which being accomplished, the other to be void and of no effect.

Signed, sealed and delivered by the said , in the presence of , notary public (f).

The owner is entitled to hypothecate his ship, and he may do so without the concurrence of the master (g). The master, also, may, under certain circumstances which will be stated shortly (h), hypothecate the vessel, freight, or cargo. For this purpose it is not necessary that he should be the registered master (i); he possesses this power if he is the ostensible

By and to whom bottomry bonds may be given.

(f) See also the forms of bonds set out in the reports of the following cases: *The Gratitude*, 3 Rob. 240, and App. No. IV. (cargo); *The Atlas*, 2 Hagg. 49 (ship and freight); *The Mersey*, 3 Hagg. 404 (ship and freight); *The Heligoland*, Swa. 491 (ship); *The Hero*, 2 Dods. 139 (ship, cargo, and freight), where the bond proceeded on was executed at Liverpool; and *Broomfield v. The Southern Insurance Company (The Great Pacific)*, L. R., 5 Ex. 192, where the defeasance of the bond is alone set out. For forms of bottomry bills, see *The Elpis*, L. R., 4 A. & E. 1; *The D. H. Bills*, 4 P. D. 32; *The Cecilie*, 4 P. D. 210; *The Empusa*, 5 P. D. 6. Other forms of bottomry bonds and bills are to be found in the Appendices to Kay's *Masters and Seamen*, and in Brook's *Office of a Notary*, 1876. Bottomry bonds are usually, where circumstances admit, executed in the presence of the consul of the State to which the ship belongs, or of a notary public, who certifies to their due execution. There is no special provision in the Stamp Act, 33 & 34 Vict. c. 97, respecting bottomry or respondentia; but it is provided by the schedule to that act that instruments for the sale, transfer,

or other disposition, either absolutely or by way of mortgage or otherwise of any ship or vessel, or any part, interest, share or property of or in any ship or vessel, shall be exempted from all stamp duties. The question whether a bottomry bond executed in this country is exempted from stamp duty under this last provision or is chargeable with duty as a bond appears not to have been decided. (See 33 & 34 Vict. c. 97, Schedule, "Bond.")

(g) *The Duke of Bedford*, 2 Hagg. 294; *The Royal Arch*, Swa. 276; *The Heligoland*, Swa. 491. See also *Wills v. Palmer*, 7 O. B., N. S. 361; *The Draco*, 2 Sumner (American) Rep. 157; *The Mary*, 1 Paine (American) Rep. 671, in which it was held that the right of the owner to hypothecate is not limited, as that of the master is, to cases of necessity. A master, who is also part owner, has not on that account any greater power to bind his part owners. *The Orelia*, 3 Hagg. 75.

(h) *Post*, p. 564.

(i) See the judgment of Sir J. Nicholl in *The Orelia*, 3 Hagg. 81; *The Mary Ann*, L. R., 1 A. & E. 13.

and acting master (*j*). Nor is it indispensable that the master should have been appointed by the owners; the Court of Admiralty has supported bonds effected by masters who have, in cases of necessity, been substituted by an agent of the owner (*k*), or by the consignee of the cargo (*l*), or even by the British consul at a foreign port (*m*).

In the absence of fraud or collusion a bottomry bond may be executed to the person by whom the master was appointed (*n*), or to the consignee of the cargo (*o*), or even, under strong circumstances of necessity, to the agent of the shipowner (*p*). But a bottomry bond cannot be given to a person who, at the time, is indebted to the shipowner in respect of the ship (*q*).

When master may hypothecate ship, freight and cargo.

The master has power, in cases of necessity, and in such cases only, to hypothecate the ship, freight, or even the cargo. Necessity is the very foundation of this right (*r*). If the master, when in a foreign country, is in want of money to repair or victual the vessel, or for other necessities, he is bound, in the first instance, to endeavour to obtain it from his owners' agent (*s*), or to raise it on the credit of his owners; and if he can by any possibility so obtain or raise the money, he must do so; but if he cannot otherwise obtain or raise the money he may, after communicating, where communication is practicable, with the shipowner, if it is intended to raise money on bottomry of

(*j*) See the judgment of Sir W. Scott in *The Jane*, 1 Dods. 464. In that case the master had not been actually dismissed when the money was advanced.

(*k*) *The Kennersley Castle*, 3 Hagg. 1. See also *The Dunvegan Castle*, 3 Hagg. 1; and *Parmeter v. Todhunter*, 3 Campbell, 541.

(*l*) *The Alexander*, 1 Dods. 278; *The Tartan*, 1 Hagg. 1; *The Rubicon*, 3 Hagg. 9.

(*m*) *The Zodiac*, 1 Hagg. 320; see also *The Cynthia*, 16 Jur. 748, in which a bond given, under circumstances of necessity, by the consul himself, was supported. See also *Parmeter v. Todhunter*, 1 Campb. 541.

(*n*) *The Alexander*, 1 Dods. 278; *The Rubicon*, 3 Hagg. 9.

(*o*) *The Alexander*, *ubi supra*; *The Nelson*, 1 Hagg. 169. In America it has been held that there can be no hypothecation to a consignee. *Liebart v. The Ship Emperor*, Bee's (American) Rep. 339.

(*p*) See the judgments of Sir W. Scott in *The Hero*, 2 Dods. 144, and *The Oriental*, 3 W. Rob. 243. The decision in *The Oriental* was reversed by the Privy Council, *S. C.*, *nomine Wallace v. Fielden*, 7 Moo. P. C. C. 398, but not on this ground. See also *The Staffordshire*, L. R., 4 P. C. 194; *The Royal Stuart*, 2 Spks. 261. In *The Royal Arch*, Swa. 269, Dr. Lushington said: "It is settled law that an agent may legally take a bottomry bond, and more especially he may do so with the sanction of the owner."

(*q*) *The Hebe*, 2 W. Rob. 146.

(*r*) As to what constitutes necessity, see *The Karnak*, L. R., 2 A. & E. 298; L. R., 2 P. C. 505; *The Australian Steam Navigation Co. v. Morse*, L. R., 4 P. C. 222; *The Ida*, L. R., 3 A. & E. 542; *The Staffordshire*, L. R., 4 P. C. 194.

(*s*) *Lyatt v. Hicks*, 27 Beav. 616; *The Faithful*, 31 L. J., P. M. & A. 81.

the ship and freight, and with both the shipowners and the cargo owners if the hypothecation is intended to be on ship, freight and cargo, raise it on bottomry (*t*).

Thus, where a British ship was carried into a foreign port, in the possession and under the control of a mutinous crew, and expenses were incurred by a person employed by the British vice-consul to investigate into the mutiny and restore the master to his command, the Court of Admiralty supported a bottomry bond given by the master to cover these expenses (*u*). The right of the master to hypothecate is not confined to cases of necessity arising in a country other than that of the owner's residence. He may, except in the case of a British ship in a home port, hypothecate even although the ship is in a port of the country in which the owners reside, provided he have no means of communicating with them, and there is no other mode of escaping from the pressure of the necessity (*x*).

(*t*) See the judgments of Lord Stowell in *The Gratitude*, 3 Rob. 255, and in *The Nelson*, 1 Hagg. 176; *The Prince of Saxe Coburg*, *nomine Soares v. Rahn*, 3 Moo. P. C. C. 1; *The Hersey*, *nomine Gore v. Gardiner*, *ib.* 79; *Stainbank v. Fenning*, 11 O. B. 88; *The Oriental*, *nomine Wallace v. Fielden*, 7 Moo. P. C. C. 398; *The Empire of Peace*, 39 L. J., Adm. 12; *The Cargo ex Hamburg*, Br. & L. 253; 32 L. J., P. M. & A. 161; 2 Moo. P. C., N. S. 289. See also *Story on Agency*, ss. 116, 118, and 119. As to the expediency of the master advertising before taking a loan on bottomry, see *The Laurel*, Br. & L. 317. It has been laid down in the Admiralty Court and Privy Council, that in deciding on the right of a master to hypothecate, the Court will be governed by the *lex fori* and not by the *lex loci contractus*, or by the law of the country to which the ship belongs. See the judgment in *The Cargo ex Hamburg*, Br. & L. 253, and *post*, p. 569. But where there is no provision in the charterparty to the contrary, both the shipowner and the shipper will be considered to have intended that the extent of their liability in any disputes between each other should be decided according to the law of the country to which the ship belongs, and not by the general maritime law. See *Lloyd v. Guibert*, L. R., 1 Q. B. 115, in which the case of *The Cargo ex Hamburg*, *ubi supra*, is distinguished. See also *Moore v. Harris*, 1 App. Cas. 318. In bottomry, as in other cases, the judgment

in rem of a foreign Court of competent jurisdiction is conclusive; and an hypothecation duly made by a curator appointed by such a Court will, unless there be fraud, or on the face of the judgment manifest error, or the contravention of natural justice, be binding. See *Messina v. Petrocochino*, L. R., 4 P. C. C. 144; *Dent v. Smith*, L. R., 4 Q. B. 414. See also p. 67, note (*a*) and p. 85.

(*u*) *The Gauntlet*, 3 W. Rob. 82.

(*x*) *La Ysabel*, 1 Dods. 273; *The Trident*, 1 W. Rob. 29. These cases establish the principle that the locality of the owner's residence is only one ingredient (generally, however, a very material one) in inquiring into the necessity of the act. See also *The Royal Arch*, Swa. 276; *The Rhadamante*, 1 Dods. 201; *The Lochiel*, 2 W. Rob. 34; and *The Oriental*, 3 *ib.* 243. In *Arthur v. Barton*, 6 M. & W. 138; *Johns v. Simons*, 2 Q. B. 425; and *Beldon v. Campbell*, 6 Ex. 886, the same principle was acted upon where the owner's credit had been pledged without any hypothecation. As to what is a home port in relation to persons having claims for repairs done to, or supplies furnished to, ships, see the 19 & 20 Vict. c. 60, s. 18; 19 & 20 Vict. c. 97, s. 8; Appendix, p. ccciii., and *ante*, p. 97, note (*g*); and see *The Barbara*, 4 C. Rob. 1, and *The Rhadamante*, 1 Dods. 206, and *infra*, p. 574, note (*c*).

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Duty of master to communicate with owners of ship and cargo, where practicable.

The master is not in all cases bound, before hypothecating the cargo, to communicate with the owners of it; although where this is practicable it is incumbent on him to do so (*y*). Where a master executed at New York a bottomry bond on ship, freight and cargo, without communicating with the owner of the cargo, who resided at St. John's, New Brunswick, (as he might have done by telegraph,) the bond was declared to be void (*z*). So, where upon the evidence before the Court it appeared that a bottomry bond on ship and cargo had been granted by the master in Sweden, where the shipowners resided, and with their consent, but that the master had not, although under the circumstances it was practicable, communicated with the owners of the cargo, who resided at Hull, the Court was of opinion that the bond was not valid, so far as the cargo was concerned (*a*). It appeared, however, in the same case, upon further evidence being brought before the Court, that the master had, in fact, informed the cargo owners of the injured state of the ship, and that they had sent no reply to his letter, and the Court thereupon sustained the bond against them (*b*).

Where communication is practicable, it is essential to the validity of the bond that the shipowner, and if the cargo is bottomried *a fortiori* the cargo owner, should be informed, before the money is borrowed, not merely of the ship's distress, but also of the master's intention, and the necessity for raising money on bottomry (*c*).

Validity of bonds given

It is not essential to the validity of a bottomry bond that it

(*y*) *The Olivier*, Lush. 484; *The Cargo ex Hamburg*, 32 L. J., P. M. & A. 161; 2 Moo. P. C., N. S. 289; Br. & L. 253; *The Lizzie*, L. R., 2 A. & E. 254; *The Karnak*, L. R., 2 A. & E. 289; L. R., 2 P. C. 505; *The Onward*, L. R., 4 A. & E. 38; *Kleinwort, Cohen & Co. v. The Cassa Marittima of Genoa*, 2 App. Cas. 156.

(*z*) *The Oriental*, *nomine Wallace v. Fielden*, 7 Moo. P. C. C. 398.

(*a*) See the judgment of the Privy Council in *The Bonaparte*, *nomine Wilkinson v. Wilson*, 8 Moo. P. C. C. 459, in which that Court differed in this respect from the judgment below in 3 W. Rob. 298. See also the judgment of Lord Stowell in *La Ysabel*, 1 Dods. 273.

(*b*) *The Bonaparte*, *ubi supra*.

(*c*) *The Onward*, L. R., 4 A. & E. 38; *The Olivier*, Lush. 484, and the view taken in that case of the decision in *The Oriental*, 7 Moo. P. C. C. 398. Doubts were, however, expressed by Dr. Lushington in his judgment in the first-mentioned case, as to the correctness of this view. See also the judgment of Lord Cottenham in *Glascott v. Lang*, 2 Phill. 310; and *Kleinwort, Cohen & Co. v. The Cassa Marittima of Genoa*, 2 App. Cas. 156. The fact of the owner being bankrupt will furnish no excuse to the master for not communicating with him; and in case he has been judicially declared bankrupt, the trustee of his estate must be communicated with to uphold the validity of a bottomry bond. *The Panama*, L. R., 2 A. & E. 390; L. R., 3 P. C. 199.

should be given in order to enable the ship to conclude a voyage for which she has been chartered; a bond may be granted upon a British ship in a foreign port for the expenses of repairs and the outfit for a new voyage (*d*). at commencement of voyage.

The money must be needed for the ship. The master cannot hypothecate for a debt of his own (*e*); nor for a general average contribution arising in respect of an earlier voyage; nor for premiums of insurances on the ship or freight (*f*); nor can the master hypothecate for a debt incurred for the ship on a previous voyage (*g*). Nor can a person who has a claim against the owners of a ship, and who has arrested the ship at a foreign port, in order to enforce the claim, make the release of the ship the foundation of a bottomry transaction. But money advanced at a port abroad, in order to prevent the arrest of the ship, may be the subject of bottomry (*h*). Where, however, the ship is in a foreign port, he may, to enable her to come home, include in a bottomry bond charges which relate to the outward cargo (*i*). It is not essential that there should have been an actual advance of money before the bond is given; if the obligee has pledged his credit for the repairs of the ship, the bond is good (*j*). For what purposes bond may be given.

The necessity for the money must arise in the course of the master's acting within the scope of his authority; if it be caused by his acting or carrying out schemes contrary to the orders of his owners, he has no power to hypothecate (*k*).

The cargo may be hypothecated not only for its own immediate benefit, but also for the reparation of the ship, if by such reparation the cargo would be indirectly benefited (*l*). But as the contract of hypothecation is a mere pledge and not a con- For what purposes cargo may be hypothecated.

(*d*) *The Royal Arch*, Swa. 269.

(*e*) *King v. Perry*, 3 Salk. 23; 6 Vin. Ab. Admiral. Law (C.), pl. 2; *The Augusta*, 1 Dods. 283; *Dobson v. Lyall*, 8 Jur. 969.

(*f*) *The North Star*, Lush. 45; *The Serafina*, Br. & L. 277.

(*g*) *The Lochiel*, 2 W. Rob. 45; *The Osmanli*, 3 W. Rob. 198; *The Prince George*, 4 Moo. P. C. C. 21; *The Toivo*, 1 Spks. 185.

(*h*) *The Ida*, L. R., 3 A. & E. 542; and see *The Augusta*, 1 Dods. 281; *The Karnak*, L. R., 2 A. & E. 303; 2 P. C. 505.

(*i*) *The Edmond*, Lush. 57. See, in the judgment in this case, the comments upon *The Osmanli*, *ubi supra*.

(*j*) *The Royal Arch*, Swa. 269.

(*k*) *The Reliance*, 3 Hagg. 66. See also the judgment in *The Mary Ann*, 4 Notes of Cases, 381.

(*l*) See the judgment of Lord Stowell in *The Gratitude*, 3 Rob. 260. The power of the master over the cargo is the result of the necessity of the case; for, in the ordinary course of things, he is a mere stranger to the cargo, except for the purposes of safe custody and conveyance. *Id.* See also Story on Agency, s. 118. When a bottomry bond on the cargo is given for repairs of the ship, it will not be upheld if it appear that the benefit to the cargo was not such as to justify it. See the judgment in *The Gratitude*, 3 Rob. p. 261, and *The Onward*, L. R., 4 A. & E. 38.

was given; and in no instance has a bottomry instrument been held valid by a Court of this country except where the requirements of the law of the tribunal have been complied with (y).

Power of
master to give
collateral bills
of exchange.

Bills of exchange, drawn by the master on the owner as a security for money advanced for the necessities of the ship, cannot be treated as instruments of hypothecation, although they are accompanied by a verbal agreement that the ship is to be liable (s). But bills of exchange may be, and very commonly are, given at the same time with a bottomry bond as collateral securities for the repayment of the money lent; and when this is done the validity of the hypothecation is not affected (a).

Advances
must be made
on security of
the bond.

It is necessary that, at the time when the goods are supplied, or the advances made, there should be an agreement that the price of the goods or the amount advanced should be secured by hypothecation (b). If the advances are originally made on personal credit, and no notice is given by the creditor that he intends to take a bottomry bond, a bond subsequently given to secure them will not be supported (c). If, however, the original agreement was for bottomry, a bond given subsequently is valid.

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(y) *The Atlas*, 2 Hagg. 54; see also *The Hamburg*, Br. & L. 253, and the judgment of Willes, J., in *Lloyd v. Guibert*, L. R., 1 Q. B., at p. 125, and see *ante*, p. 565, n. (f); *Ridgway v. Roberts*, 4 Hare, 106. The law of France requires that the master, before he hypothecates the ship or cargo, shall obtain the authority of the "Tribunal de Commerce" if in France, or of the French consul or a magistrate if the master is in a foreign port. Code de Comm. Art. 234. By the English law there is no such requirement.

(z) *Ex parte Halkett*, 3 Ves. & B. 135; 19 Ves. 474; *The Augusta*, 1 Dods. 283.

(a) *The Jane*, 1 Dods. 466; *Stainbank v. Shepard*, 13 C. B. 418. See the judgment in *The St. Catherine*, 3 Hagg. 253; *The Emancipation*, 1 W. Rob. 129; and the judgments in *The Ariadne*, *ib.* 421; *The Lord Cochrane*, 3 Notes of Cases, 180; *The Bonaparte*, 3 W. Rob. 306; 8 Moo. P. C. C. 460; *The Onward*, L. R., 4 A. & E. 38. See also the observations in the judgment in these cases upon *Samsun v. Bragington*, 1

Ves. sen. 443, which has been supposed to be inconsistent with this rule, and the judgments of Lord Stowell in *The Nelson*, 1 Hagg. 176, and in *The Atlas*, 2 Hagg. 52. Where both a bill and bottomry bond were given, it was held that to entitle the bondholder to enforce his bond it was not necessary that there should have been such a dishonour of the bill as would give a right of action against a drawer or indorser, but that it was sufficient if reasonable steps had been taken to get the bill accepted and paid. *Smith v. The Bank of N. S. Wales (The Staffordshire)*, L. R., 4 P. C. 194.

(b) *The Hersey*, *nomine Gore v. Gardiner*, 3 Moo. P. C. C. 79.

(c) See the judgment in *The Augusta*, 1 Dods. 287; *The Nelson*, 1 Hagg. 177; *The Wave*, 15 Jur. 518; *The Gauntlet*, 3 W. Rob. 82; *The Indomitable*, Swa. 446. In the absence of evidence, the foreign lender is presumed to make advances in contemplation of a bottomry security. *Per* Sir. R. Phillimore, *The Karnak*, L. R., 2 A. & E. 301; and see *The Alexander*, 1 Dods. 278; *The Fibilia*, 1 W. Rob. 12.

If a portion of the money advanced was lent on personal credit, and the residue on the security of the bond, the Court will enforce the bond to the extent of the latter sum (*d*).

It is an essential part of the contract of hypothecation by the master, that the repayment of the money should be dependent upon the ship's arrival at her destination (*e*). If the deed makes the loan repayable at all events, the contract is invalid as an hypothecation (*f*). But as these instruments are the creatures of necessity and distress, and usually contain the language of commercial men and not of lawyers, they receive a liberal construction (*g*). It is not therefore necessary that the risk should be mentioned in express terms; it is sufficient if it can be fairly and reasonably inferred from the whole document that it was the intention of the parties to make the repayment of the money dependent on this contingency (*h*).

Maritime risk essential part of contract.

Where money was lent on bottomry under a bond which stipulated that the payment of the bond should be made after the ship's arrival at a specified port, and the ship sailed on her voyage, but, owing to sea perils, was forced to put into an intermediate port, where she was condemned as unseaworthy, it was held, the completion of the voyage after the risk had commenced having been prevented by an impossibility which the bondholder could not control, that the amount and interest secured by the bond had become due and payable (*i*).

Right to payment of bond where completion of voyage prevented.

(*d*) *The Augusta*, 1 Dods. 283.

(*e*) The words "my arrival" and "my ship's arrival," have the same effect. *The Cecile*, 4 P. D. 210.

(*f*) *The Indomitable*, Swa. 446; *Miller & Co. v. Potter, Wilson & Co.*, 3 Sess. Cas. (4th series), 105. See *Stainbank v. Fenning*, 11 C. B. 88; 13 C. B. 418; and *The Serafina*, Br. & L. 277. The owner may hypothecate the ship, and, if he chooses, make himself also personally liable. See the judgment in *Willis v. Palmer*, 7 C. B., N. S. 360. A bottomry bond may also, as we have seen, be given at the same time with and as a collateral security for bills drawn on the owners for the money borrowed. *Stainbank v. Shepard*, 13 C. B. 418; *The Onward*, L. R., 4 A. & E. 38. And see *supra*, p. 570.

(*g*) See the judgment of Sir C. Robinson in *The Kennersley Castle*, 3 Hagg. 7; and the judgments in *The Alexander*, 1 Dods. 280, and *The Yibilia*,

1 W. Rob. 5.

(*h*) *Simonds v. Hodgson*, 3 B. & Ad. 50; 6 Bing. 114; *The Nelson*, 1 Hagg. 169; see also the judgment in *The Emancipation*, 1 W. Rob. 130. In *The Royal Arch*, Swa. 269, it was held that the omission in a bottomry bond to state any premium for maritime risk, the rate of interest reserved being the ordinary interest only, was a circumstance of suspicion, but did not invalidate the bond.

(*i*) *The Dante*, 2 W. Rob. 429. If the maritime risk had not commenced, it seems the Court would not have decreed payment of maritime interest. *Id.* See also *The Empusa*, 5 P. D. 6. Where the ship and freight are both bottomried, the ordinary rule is that the bond should, if the ship and freight belong to different persons, be paid rateably. *The Douthorpe*, 2 W. Rob. 73.

So also the bond becomes due if the voyage stipulated for is abandoned by the act of the shipowner or the master, without the consent of the bondholder (*j*).

It would seem that where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the negligent navigation of the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down is entitled to claim, in respect of the loan on bottomry, a proportionate part of the sum awarded for loss of freight (*k*).

Meaning of
"loss" in
contracts of
bottomry.

The loss of the ship, within the meaning of these contracts, is understood to be her actual destruction, or absolute loss to her owners. If she still exists, although in such a state of damage as to be constructively totally lost within the meaning of a policy of insurance (*l*), or if she is captured, and afterwards re-taken and restored (*m*), she is not lost in the sense attached to that word in the contract of hypothecation.

In policies of insurance on bottomry bonds, the word loss has the same effect and meaning as in the bond itself. Therefore an assured on a bottomry bond cannot recover in the case of a constructive total loss (*n*).

Bonds may be
in part good
and in part
bad.

The Court of Admiralty will support a bottomry bond as to part of the debt secured by it, although the residue may consist of a debt that cannot be covered by such a security (*o*).

Interest that
may be re-
served.

Upon a bottomry contract the lender may stipulate to receive any rate of interest. The contract was never liable to any objection on the ground of usury, for the principal is at hazard during the voyage (*p*). A bond is valid although it reserves no

(*j*) *The Heligoland*, Swa. 499; *The Catherine*, 15 Jurist, 232. See also *The Armadillo*, 1 W. Rob. 256.

(*k*) *The Empusa*, 5 P. D. 6, where the instrument of bottomry incorporated a provision that if there should be no payment of freight, either total or partial, the loan should not be paid back.

(*l*) *Thomson v. The Royal Exchange Assurance Company*, 1 M. & S. 30; *Stephens v. Broomfield (The Great Pacific)*, L. R., 2 P. C. 516. As to the probable meaning of "such an average as shall by custom be due on the bond," see *The Great Pacific*, *ubi supra*; *The*

Elephanta, 15 Jurist, 1185.

(*m*) *Joyce v. Williamson*, 3 Doug. 164.

(*n*) *Broomfield v. The Southern Insurance Company*, L. R., 5 Ex. 192.

(*o*) See *The Augusta*, 1 Dods. 283; *The Hero*, 2 Dods. 139; *Smith v. Gould*, 4 Moo. P. C. C. 21; *The Heart of Oak*, 1 W. Rob. 204; *Dobson v. Lyall*, 3 Myl. & Cr. 453, note; 2 Phill. 323, note.

(*p*) *Sharpley v. Hurrell*, Cro. Jac. 208; *Soome v. Gloom*, Sid. 27; 2 Park on Ins. 622; and the judgment in *The Cognac*, 2 Hagg. 387. See the repealed acts of the 2 & 3 Vict. c. 36, and the 13 & 14 Vict. c. 56, and the 17 & 18

interest. In such a case the Court will allow interest at the usual rate of 4 per cent. (g).

A bond given under actual duress is invalid, but a voluntary contract is not invalidated by reason of its being executed by the master whilst under arrest (r). Bond given under duress.

Although the bottomry bond may purport to assign the ship to the obligee, it does not transfer the property in her, but only gives the bondholder a claim upon the ship or goods, which can be enforced by process of law (s). Effect of the contract.

The contract of hypothecation, being a mere *chose in action*, was not assignable at common law. In the Court of Admiralty, however, it was always considered to be assignable, and proceedings might be taken on it against the ship by the person to whom it is transferred (t); and now, as we have seen, since the Judicature Act all choses in action are assignable (u).

The hypothecation of the ship binds the shipowners indirectly, but, unless they have themselves agreed to be personally liable, it does not render them liable to be personally sued, either in the Admiralty Division or in any other court (v). The remedy of the bondholder is either against the master himself, or against the property hypothecated (w). The master cannot, therefore, pledge the shipowner to the lender of the money REMEDIES ON THE CONTRACT.

Vict. c. 90, s. 1. The interest reserved by a bottomry bond is commonly called *maritime interest*. In the Roman law the contract was called *fenus nauticum*, or *usura maritima*, and the interest *pretium periculi*. See the judgment of Lord Stowell in *The Atlas*, 2 Hagg. 53. An excessive rate of interest may form the ground for impeaching a bond as fraudulent, but it does not otherwise affect its validity. *The Laurel*, Br. & L. 317. Where the interest is clearly excessive the Court may order it to be reduced. *The Cognac*, 2 Hagg. 377; *The Huntly*, Lush. 24. See also *The Edmond*, Lush. 211.

(g) *The Cecile*, 4 P. D. 210. See also *The Royal Arch*, Swa. 280; *The Change*, ib. 240.

(r) *The Heart of Oak*, 1 W. Rob. 204; *The Gauntlet*, 3 W. Rob. 82.

(s) See *Johnson v. Shippen*, 2 Ld. Raym. 982; the judgment in *Stain-*

bank v. Fenning, 11 C. B. 88; and the judgment of Sir W. Scott in *The Tobago*, 5 Rob. 222.

(t) See the judgment of Sir W. Scott in *The Rebecca*, 5 Rob. 104; and *The Prince of Saxe Coburg*, 3 Hagg. 387; 3 Moo. P. C. 2. According to the French law the contract (*l'acte de prêt à la grosse*) may be negotiated by indorsement if the money was made payable to order, but the indorser is not, in the absence of any express stipulation, liable to his indorsee for more than the principal without the maritime interest. See Code de Comm. Art. 313, 314.

(u) See *supra*, p. 337, note (a).

(v) See *Johnson v. Shippen*, 1 Salk. 35; 3 C., 2 Ld. Raym. 982; and the judgment in *Benson v. Duncan*, 3 Ex. 656.

(w) See the judgment of Powell, J., in *Trantor v. Watson*, 6 Mod. 13.

beyond the value of the ship and freight (*x*). The lender of money upon the hypothecation of goods had at common law no specific remedy at law against the goods themselves (*y*).

**Jurisdiction
of Admiralty
Division.**

The usual and most beneficial remedy for the holder of a bottomry bond is a proceeding *in rem* in the Admiralty Division against the property hypothecated (*z*). The Admiralty Division has jurisdiction to enforce a bottomry contract given in the course of a voyage, although it is under seal, and whether it was executed on land or at sea (*a*). And it would seem that jurisdiction of the Court over the contract exists not only where a bond has been actually executed, but also where only an agreement for a bond has been entered into (*b*). The Admiralty Division has no jurisdiction where the ship has been hypothecated in this country before the voyage begins (*c*). In actions of bottomry it may decide all questions as to the title or ownership of the ship, or as to her proceeds (*d*).

Therefore, to an action for freight, a plea alleging that a certain sum of money had been borrowed on a bottomry bond, that the amount had not been paid, and that thereupon, after the commencement of the action, proceedings had been insti-

(*z*) See the judgment in *Benson v. Duncan*, *ubi supra*.

(*y*) See 2 Bl. Comm. 457 (by Coleridge); *Busk v. Fearon*, 4 East, 319; the judgment of Lord Mansfield in *Glover v. Black*, 3 Burr. 1401; and *The Prince Regent*, cited 2 W. Rob. 85.

(*c*) *Johnson v. Shippen*, 2 Ld. Raym. 982; *Benson v. Jeffries*, 1 ib. 152; *King v. Perry*, 3 Salk. 23. See also the judgments in *The Gratitude*, 3 Rob. 255; *The Rhadamantha*, 1 Dods. 203; and *The Atlas*, 2 Hagg. 52; *The Lord Cochrane*, 1 W. Rob. 312; and the judgment in *The Trident*, ib. 35. The Admiralty jurisdiction is founded upon the same principles, whether the ship or the cargo be hypothecated. *The Cargo ex Sullan*, Swa. 510. The county courts having Admiralty jurisdiction have no jurisdiction in actions of bottomry. *The Elpis*, L. R., 4 A. & E. 1.

(*a*) *Meretons v. Gibbons*, 3 T. R. 267; *King v. Perry*, 3 Salk. 23. See also the judgment of Sir W. Scott in *The Gratitude*, 3 Rob. 259.

(*b*) See the judgment of Dr. Lushington in *The Aline*, 1 W. Rob. 122. See also *The Grecia*, 7 N. of Ca. 410. It has been doubted whether the Court

of Admiralty had jurisdiction where the bond is absolute, and not defeasible by the loss of the ship; such an instrument not being strictly a bottomry bond. See the judgment of Lord Stowell in *The Atlas*, 2 Hagg. 52.

(*c*) *The Royal Arch*, Swa. 269; see also *per Holt*, C. J., in *Johnson v. Shippen*, 2 Ld. Raym. 983; *Ladbroke v. Crickett*, 2 T. R. 649; *The Jenny*, 2 W. Rob. 5; and the judgment in *The Aline*, 1 W. Rob. 121. It was doubted whether a bond given on an English ship when such ship was lying in an Irish port or in the port of Jersey, was valid. *The Barbara*, 4 C. Rob. 1; *The Rhadamantha*, 1 Dodson, 204. Where, however, the bond is given to pay for repairs, it might possibly be held that the 19 & 20 Vict. c. 97, s. 88 (Appendix, p. cxxiii), makes ports in Ireland or Jersey home ports.

(*d*) 3 & 4 Vict. c. 65, s. 4. (Appendix, p. cxxiii.) See also the Admiralty Court Act, 1861 (24 Vict. c. 10, Appendix, p. cxxiii.), extending and defining the jurisdiction of the Court of Admiralty.

tuted in the Court of Admiralty for the recovery of it, and that the defendants had, in pursuance of a monition issued out of that Court, paid the freight into the registry of that Court, was held to be a good answer, although the amount of the freight exceeded what was due on the bottomry bond (e).

The claim of a bottomry bondholder has precedence of the claims of a material man (f), except in those cases where a possessory lien has previously been acquired (g), and is preferred to the claim of a mortgagee, even though the existence of the bond has been concealed (h). Where salvage services were rendered by salvors who subsequently took up a loan on bottomry on the security of the salvaged ship, it was held that the bottomry bond was a proper deduction from the value of the property out of which the award of salvage was to be made (i). So, also, where a vessel on which an amount had been lent on bottomry was arrested in an action of damage and found to blame for a collision which had occurred previously to the date of the execution of the bond, it was held that, on the validity of the bond being pronounced for, the bottomry bondholder would be entitled to have the amount of the bond satisfied *pro tanto* out of such accretions in the value of the vessel as arose from repairs effected before the arrest of the vessel upon the security of the bottomry bond, the plaintiff in the damage cause having only a right to recover damages against the residue of the proceeds (j).

Priority of bottomry claims over other claims.

The holder of a bottomry bond is, however, not entitled to priority over persons having claims against the ship in respect of wages earned either on the voyage on which the bond was given, or on a subsequent voyage, or of subsequent salvage (k),

What claims have precedence over bottomry claims.

(e) *Place v. Potts*, 8 Ex. 705; 10 Ex. 370; 5 H. of L. Cases, 383; see also *In re Place*, 8 Ex. 704, where the Court of Exchequer refused, in the earlier stage of this case, to grant a writ of prohibition to the Admiralty Court.

(f) *The W. F. Safford*, Lush. 69.

(g) *The Gustaf*, Lush. 606.

(h) *The Dunvegan Castle*, 3 Haggy. 333; *The Royal Arch*, Swa. 269; *The Heligoland*, Swa. 491.

(i) *The Selina*, 2 N. of C. 18. As to whether wages earned on a voyage previous to that on which a bottomry bond is given do not rank after the

bond, see *The Mary Anne*, 9 Jur. 95; *The Hope*, 1 Asp. Mar. Law Ca. 563.

(j) *The Aline*, 1 W. Rob. 120.

(k) See the judgment of Sir J. Nicholl in *The Hersey*, 3 Haggy. 407; *The Madonna d'Idra* 1 Dods. 36; *The Sidney Cove*, 2 Dods. 13; *The William F. Stafford*, Lush. 71; *The Union*, Lush. 128; *The Hope*, 1 Asp. Mar. Cases, 563; and as to the maritime lien of the bondholder, *ante*, p. 86. Where a master has bound himself by the bond, he cannot claim precedence for his wages. *The Jonathan Goodhue*, Swa. 524. This principle, however, will only be

damage (*l*), pilotage or towage (*m*). In a case in which, after the hypothecation of a homeward cargo at a foreign port, it was found that, in order to make the cargo available either for the bondholders or the owner, it was essential to carry it on, and accordingly it was transhipped and brought forward; it was held, in the Privy Council, that the freight incurred by so doing, and also a claim for general average arising on the homeward voyage, were in the nature of salvage services, and were consequently entitled to priority over the claims of the bondholders (*n*).

The charterer may deduct from the freight which is payable to the holder of a bottomry bond a premium paid for the insurance of a part of the freight which was advanced before the bond was granted (*o*).

Priority of
bond holders
inter se.

Where there are several bond holders they are *inter se*, in the absence of special circumstances, entitled to priority in an inverse order, the last being paid first, as the amount secured by the last bond saves the ship, and renders the earlier securities available (*p*).

Rule of the
Court as to
costs.

As a general rule, the Court gives costs to the bondholder

acted upon in cases where the position of the bottomry bondholder will be prejudiced by the master being paid before him. *The Edward Oliver*, L. R., 1 A. & E. 379; *The Daring*, L. R., 2 A. & E. 260; *The Eugenia*, L. R., 4 A. & E. 123; see also *In the matter of the ship Portugal*, L. R., 6 Bengal, 323; *The Priscilla*, Lush. 1. The rule does not apply where the master has incurred no such personal obligation. *The Salacia*, Lush. 578. It holds good although the master is part-owner. *The Daring*, L. R., 2 A. & E. 260. The priority of a bottomry bond over other creditors exists, in ordinary cases, only during the voyage for which it was executed, and the holder should enforce the bond within a reasonable time after the ship has arrived. If he fails to do this and enters into an agreement to postpone the payment until the completion of another voyage, his security under the bond and his right of proceeding in Admiralty cease. *The Royal Arch*, Swa. 269.

(*l*) *The Aline*, 1 W. Rob. 119; *The Benares*, 7 N. of C. Suppl. lii.

(*m*) *The Constancia*, 10 Jur. 845;

The St. Lawrence, 6 P. D. 252.

(*n*) *The Cargo ex Galam*, Br. & L. 167; *S. C.*, *Cleary v. M'Andrew*, 11 W. R. 496. A claimant on respondentia is postponed to a person having a possessory lien for freight earned subsequently to the giving of the respondentia bond. *Id.*

(*o*) *The Catherine*, Swa. 263; *The Nostra Senora del Carmore*, 1 Spks. 303. See *The Edmond*, Lush. 211; *The Salacia*, 32 L. J., Adm. 43.

(*p*) *The Betsey*, 1 Dods. 289; *The Sydney Cove*, 2 ib. 1; *The Eliza*, 3 Hagg. 87; the judgments in *The Exeter*, 1 Rob. 177; and in *The Rhodamante*, 1 Dods. 204; and *The Priscilla*, Swa. 1. See also *The Constantia*, 4 N. of C. 285; *The Priscilla*, Lush. 1. The rule of the French law is similar. The loans on the last voyage of the ship are preferred to those made on a former voyage, even although the later loans are expressed to be in continuation of the former. Money borrowed during the voyage is payable before money borrowed before the ship sailed; and in the case of several loans during the same voyage, the last has priority. See the Code de Comm. Art. 323.

establishing his right; but this rule is not inflexible, and will be varied to meet the justice of the case (*q*).

Where a vessel had been seized by Admiralty process, the master, who was also the owner, having executed in England an instrument under seal, purporting to be a bottomry security, and a decree had been made in the Admiralty Court for her sale, and between the seizure and decree a writ of *fi. fa.* was issued against the owner at the suit of another creditor, it was held that the sheriff could not take the vessel out of the possession of the Admiralty marshal, or maintain trover against him (*r*). Where a vessel has been arrested in a cause of bottomry, and is in the custody of the Admiralty Court, no distress can be levied on her for a seaman's wages, under the summary powers given by s. 523 of the Merchant Shipping Act, 1854 (*s*).

Powers of Court as to enforcement of decrees.

County Courts having Admiralty jurisdiction (*t*) have no jurisdiction in cases of bottomry, and where a suit for money supplied for necessaries which was covered by a bottomry bond was instituted in a County Court having Admiralty jurisdiction and removed to the Admiralty Court, it was held that the latter could not entertain the suit (*u*).

County Courts have no jurisdiction in bottomry.

Jurisdiction over claims in respect of bottomry and respondentia bonds is given to the Vice-Admiralty Courts abroad under the provisions of the Vice-Admiralty Courts Act, 1863 (*v*).

The Court of Chancery had jurisdiction to give relief upon bottomry bonds; and where there had been fraud (*x*), or where inquiries arose on the contract, or equities attached to it; could not in the former state of the law be satisfactorily dealt

Jurisdiction of Court of Chancery.

(*q*) *The Gauntlet*, 3 W. Rob. 167; *The North Star*, 29 L. J., Adm. 73. As to the costs of the reference to the registrar and merchants, see *The Kepler*, Lush. 201.

(*r*) *Ladbroke v. Crickett*, 2 T. R. 649. The Courts of Common Law refused also to enter into the question whether the Admiralty had any jurisdiction on such a bond, there being a sentence of that Court in force and not appealed against. The Admiralty, in cases where a reason for the intervention of the Court is shown, has jurisdiction to arrest a ship on her safe arrival before the bond is actually due. *The*

Jane, 1 Dods. 461; *The Eudora*, 4 P. D. 208.

(*s*) *The Westmoreland*, 2 W. Rob. 394. This was a decision upon s. 15 of the 7 & 8 Vict. c. 112.

(*t*) As to these County Courts, see 31 & 32 Vict. c. 71 (Appendix, p. cccvii); 32 & 33 Vict. c. 51 (Appendix, p. cccvi).

(*u*) *The Elpis*, L. R., 4 A. & E. 1.

(*v*) 26 Vict. c. 24, s. 10, Appendix, p. cxxl.

(*x*) *Glascott v. Lang*, 8 Sim. 358; 3 Myl. & Cr. 451; 2 Phill. 310; *Dobson v. Lyall*, 3 Myl. & Cr. 453, note 2; Phill. 323, note.

with by the Court of Admiralty (y), it would restrain proceedings to enforce the validity of the bond in that Court.

SALE.

When master
may sell ship.

The principles which govern the right of the master to sell the ship are similar to those which have been mentioned as justifying a hypothecation; the two most important points to inquire into in each particular case are, whether the course pursued was absolutely necessary, and whether the master acted with *bona fides* in the transaction. In some of the earlier cases the right of the master to sell under any circumstances is denied (z); but it is now clearly settled that if the termination of the voyage is hopeless, and no prospect remains of bringing the vessel home, and nothing better can be done for his employers, the master may sell the ship for the benefit of all concerned (a). Where, indeed, the ship retains the character of a ship, and is capable of being used as such, with or without repairs, a sale is viewed by the Courts with suspicion (b); but if she is totally wrecked, or has received an irreparable injury in a foreign country, or at a place where there is no correspondent of the owner, and no money can be raised by hypothecation, it is not only the right but the duty of the master to sell (c).

Where the master is justified in selling, the sale is valid against the owner, although it be without his express autho-

(y) *Duncan v. M'Calmont*, 3 Beav. 409. There appears to be no provision in the Judicature Acts as to the assignment of these cases to the Chancery Division. See 36 & 37 Vict. c. 66, s. 34, subs. 1.

(z) *Tremenhere v. Tressilian*, 1 Sid. 453; *Johnson v. Shippen*, 2 Ld. Raym. 982; *Reid v. Darby*, 10 East, 143; but see Jenk. Cent. p. 165.

(a) See the judgment in *Hunter v. Parker*, 7 M. & W. 342; and the judgments of Lord Stowell in *The Fanny and Elmira*, Edw. 118, and of Lord Gifford, C. J., in *Robertson v. Clarke*, 1 Bing. 445. See also *The Lord Cockrane*, 2 W. Rob. 335; *The Cobeguid Marine Insurance Company v. Barteaux*, 6 L. R., P. C. 319. To render the sale valid, it must be a prudent sale, under stringent necessity, and one to which the master should consent. But in cases of overruling necessity admitting of no law it would seem that the master's disapproval would not render the sale invalid. *The Uniao Vencedora*, alias

The Gipsy, 33 L. J., P. M. & A. 195. See also *ante*, 159, note (f), and *Wagstaff v. Anderson*, 4 C. P. D. 283; 5 C. P. D. 171.

(b) See the judgment in *Ireland v. Thomson*, 4 C. B. 168; see also *The Fanny and Elmira*, Edw. 117; *Read v. Bonham*, 3 B. & B. 147; *Somes v. Sugrue*, 4 C. & P. 276; *The Bonita*, Lush. 252; *The Charlotte*, *ib.*; and the cases cited *ante*, pp. 527, 528.

(c) See the judgments in *The Fanny and Elmira*, *ubi supra*, and *Ireland v. Thomson*, 4 C. B. 149; *Hayman v. Molton*, 5 Esp. 65; *Robertson v. Clarke*, 1 Bing. 445; *Hunter v. Parker*, 7 M. & W. 322; *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755; *Cambridge v. Anderton*, 2 B. & C. 691; *The Australia (Lapraik v. Burrows)*, Swa. 480; 13 Moore, P. C. C. 132; *The Catherine*, 15 Jurist, 232; *The Margaret Mitchell*, Swa. 382, and the cases cited *ante*, pp. 527, 528. See also Pritchard's Admiralty Digest, tit. OWNERS.

city (d). The master may receive the proceeds of the sale himself, or he may, acting *bond fide*, order them to be paid to the owner's credit to a third person (e). If the sale is not justifiable no title to the ship passes, under ordinary circumstances, to the vendee; nor will his claim be, necessarily, strengthened by the fact of a foreign Court of Admiralty or a Vice-Admiralty Court abroad having decreed the sale upon the petition of the master (f). Where, however, a foreign Court of competent jurisdiction directs the sale of the ship and cargo under circumstances which, by the *lex loci*, confer a title upon an innocent purchaser, and pass the property, this sale will be upheld by our Courts, although no such necessity as is required by our law existed to justify the master in selling (g). Where an English ship was sold in France under a claim for necessities by a tribunal having jurisdiction *and proceeding in rem*, it was held by the Court of Exchequer Chamber and on appeal by the House of Lords that the sale passed the property in the ship, although the judgment of the French Court was founded upon an incorrect view of the English law (h).

Effect of sale abroad valid by the *lex loci*.

Where the owner, with a knowledge of the facts, received the proceeds of the sale, it was held that this was a ratification, on his part, of the act of the master, and that he could not afterwards recover back the ship from the vendee (i). Indeed, wherever there has been an acquiescence by the owner in the sale, however unauthorized it may have been originally, it will be deemed to be ratified (k). Mere expressions of approval,

What acts of the shipowner amount to a confirmation of the sale.

(d) *The Glasgow*, Swa. 145.

(e) *Ireland v. Thomson*, 4 C. B. 149.

(f) *Ante*, p. 40.

(g) *Cammell v. Sewell*, 3 H. & N. 617; *S. C.*, in *Cam. Scacc.*, 5 H. & N. 728. In *The Eliza Cornish*, 1 Spks. 36, it was considered, that the validity of the sale abroad depended more upon the rules of the maritime law than upon the regulations of the *lex loci*, or of the English municipal law; but this view was disapproved of in the Exchequer Chamber in *Cammell v. Sewell*, *ubi supra*.

(h) *Castrique v. Imrie*, 8 C. B., N. S. 405; *L. R.*, 4 H. L. 414. The Court of Common Pleas had been of opinion in this case that the proceedings of the French Court were *in personam*. See *S. C.*, 8 C. B., N. S. 1. See further as to the effects of foreign judgments, *ante*, p. 41, and *Rousillon v. Rousillon*,

14 Ch. D. 351.

(i) *Hunter v. Parker*, 7 M. & W. 322.

(k) *The Australia*, Swa. 480; 13 Moo. P. C. C. 132, and *Simpson v. Fogo*, 1 J. & H. 18; 29 L. J., Chan. 657; 1 H. & M. 195; 32 L. J., Chan. 249. The Judicial Committee, in giving judgment in that case, said, "In all these cases we think it is the duty of the individual who has been divested of his property by means of the act of his own master, and who disapproves of that act, and considers his property to have been sacrificed, to act with the greatest possible promptitude in demanding that justice should be done to him (and for very plain and obvious reasons), because the greatest injustice might be done to the purchasers of vessels so circumstanced, unless means of enforcing the rights of the original owner are taken at an

however, or even the acceptance of the purchase-money, will not operate as a ratification if the owner is at the time ignorant of the real facts relating to the sale (*l*).

It may be here observed, that the sale of a damaged ship by the master, although made *bond fide*, will not, as against the underwriter, convert a partial loss into a total loss, if the master could, by means within his reach, have preserved to her the character of a ship (*m*).

When master
may sell
cargo.

Where the master is unable to communicate with the owner of the cargo and obtain his directions he may, in cases of absolute necessity, that is to say, where there is a total inability to carry the goods to their destination, sell a part or even the whole of the cargo; and such a sale transfers the property, and binds the owner of the goods (*n*). If, however, no such necessity exists, or the master is able to communicate with the cargo owner and does not do so, or sells in disobedience to the cargo owner's orders, a sale by the master is wrongful, and the purchaser ac-

early period. Now, it is very true that delay may not destroy the right of a party to institute a suit; but when unnecessary delay arises, and when injury to others may result from that delay, that delay may import acquiescence in the sale."

(*l*) *The Bonita*, Lush. 252; *The Charlotte*, *Id.*

(*m*) *Gardner v. Salvador*, 1 M. & Rob. 116. See also *Knight v. Faith*, 15 Q. B. 649; and *ante*, pp. 532, 533.

(*n*) See the judgments of Lord Stowell in *The Gratitude*, 3 Rob. 259, and of Bayley, J., in *Freeman v. The East India Company*, 5 B. & A. 621; the judgment in *Vlierboom v. Chapman*, 13 M. & W. 239; *Joseph v. Knox*, 3 Camp. 332; *Underwood v. Robertson*, 4 Camp. 138; *Cannan v. Meaburn*, 1 Bing. 243; *Duncan v. Benson*, 3 Exch. 644. In *Van Omeron v. Dowick*, 2 Camp. 42, the right to sell the whole of the cargo was denied. The right of the master to sell the cargo was much considered in *Tronson v. Dent*, 8 Moo. P. C. C. 419. Sir John Patteson there points out the difference between the sale of a ship and of her cargo. "It is a grave question," he says, "whether the master can in any case be justified in selling the cargo because the goods would be more damaged in the course of conveying them from the place

where he repairs his ship to the place of ultimate destination, than they have been already at the time he comes there. They may be damaged 10 per cent. at the place where he is obliged to put in, in order to repair his vessel, and it may be that they will be damaged 20 per cent. by the time they arrive at the place of destination, but it does not follow that he is at liberty to sell them on that account. If they are in such a state that he cannot convey them in the shape of merchantable goods to the place of their destination, and they would utterly perish when they arrived at their place of destination, that is quite another consideration." In *Cammell v. Sewell*, 3 H. & N. 617 (*S. C.*, in Cam. Scacc., 5 H. & N. 728), the Court of Exchequer laid down the rule as to the right of the master to sell the cargo, in the following terms:—"A master is an agent to carry and convey, not to sell, and it is only in cases of absolute necessity that he can sell, either by the law of England or by the general maritime law." As to what a master must establish in order to justify him in selling the cargo, see *The Australasian Steam Navigation Co. v. Morse*, L. R., 4 P. C. 222; *Acetos v. Burns*, 3 Ex. D. 289; *The Atlantic Insurance Co. v. Huth*, 16 Ch. D. 474, 481.

quires no title under it unless it be made in market overt (*o*). The shipowner is also liable in such case to an action at the suit of the goods' owner (*p*). And where the master sells without being justified in so doing, but is acting at the time within the general scope of his authority as master, both the shipowner and the master are liable in trover for the goods, notwithstanding the latter may have acted with perfect good faith (*q*). It was held under one of the earlier statutes, which is now repealed, that the owners were not liable, where the sale was improper, beyond the value of the ship and freight, although the sale complained of had been made by one of them who was master as well as part owner (*r*). The effect of a sale by the master acting under the directions of a foreign Court, and conducted so as to pass the property by the *lex loci*, although no necessity for the sale exists according to the law of England, has been already mentioned (*s*).

If the master necessarily sells the goods at an intermediate port for repairs, and the ship afterwards arrives at her destination, the shipper may, at his option, claim from the shipowner either the price for which the goods actually sold (*t*), or the amount for which they would have sold at the port of discharge (*u*). If, however, the ship is lost on her voyage home, the shipper cannot claim the amount for which his goods would have sold if the ship had arrived (*x*). Whether, in this case, he is entitled to the price for which they actually sold has never been determined in our Courts (*y*).

Indemnity to owner of cargo on sale.

If the sale by the master was wrongful, the amount for which

Measure of damage

(*o*) *Acates v. Burns*, 3 Ex. D. 282; *Freeman v. The East India Company*, 5 B. & A. 621; *Morris v. Robinson*, 3 B. & C. 196. Even if the sale is in market overt the purchaser acquires no title if he has notice of the circumstances under which it takes place. See *Freeman v. The East India Company*, *ubi supra*.

(*p*) *Cannan v. Meaburn*, 1 Bing. 243; *Wilson v. Miller*, 2 Stark. 1.

(*q*) *Eubank v. Nutting*, 7 C. B. 797.

(*r*) *Wilson v. Dickson*, 2 B. & A. 2. This was a decision on the 53 Geo. 3, c. 159. See *ante*, p. 78. Where the sale is necessary the statutes do not apply; see *Atkinson v. Stephens*, 7 Ex. 567.

(*s*) *Ante*, p. 578.

(*t*) *Richardson v. Nourse*, 3 B. & A. 237; *Campbell v. Thompson*, 1 Stark. 490; *The Salacia*, Lush. 578.

(*u*) *Alers v. Tobin*, Abbott on Shipping (5th edit.), p. 245; *Hallett v. Wigram*, 19 L. J., C. P. 281.

(*x*) *Atkinson v. Stephens*, *ubi supra*.

(*y*) Lord Tenterden was of opinion that under these circumstances the owner of the goods could make no claim, since he ought not to be in a better position than if the goods had not been sold. See Abbott on Shipping (5th edit.), pp. 245, 246, and the foreign authorities cited there.

where sale
wrongful.

the goods were sold by the master is not the true measure of damage, but the value of the goods to the owner (z).

No freight
due where sale
justifiable.

Where a portion of the cargo is rightfully sold by the master short of its destination, the shipowner can recover no freight in respect of the portion so sold, even although it sold for an amount greater than could have been obtained for it at the port of discharge, for the chartered freight was never earned, and the charterer having had no option, there is no freight *pro rata*; the result of the transaction is a forced loan by the charterer to the shipowner (a).

(z) Per Brett, L. J., *Acatos v. Burns*,
3 Ex. D. 291.

(a) *Hopper v. Burness*, 1 C. P. D.
137; *Acatos v. Burns*, 3 Ex. D. 288.

CHAPTER IX.

COLLISION.

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In early times there were no rules to prevent collisions between ships other than those general rules which had been established by the practice of seamen. Amongst those acknowledged rules were the following:—A sailing ship with the wind free was bound to give way to a sailing ship close-hauled (*a*); a sailing ship on the port tack had to give way to a sailing ship on the starboard tack (*b*); sailing vessels meeting, and both having the

GENERAL
RULES OF THE
SEA.

(*a*) *Jameson v. Drinkald*, 12 Moo. 148; *The Chancellor*, *nomine Williams v. Gutch*, 14 Moo. P. C. C. 202; *Handyside v. Wilson*, 3 C. & P. 528; *Vennall v. Garner*, 1 Cr. & M. 21; *Sills v. Brown*, 9 C. & P. 601; *The Zollverein*, Swa. 96; *The Dumfries*, Swa. 125; *The Eclipse*, and *The Saxon*,

Lush. 410. See also the recitals in the Trinity House Order of October, 1840, referred to *post*, p. 584, note (*e*). As to the subject of collision generally, see Marsden's "Law of Collisions at Sea," London, 1880.

(*b*) *The North American*, *nomine Zugasti v. Lamer*, 12 Moo. P. C. C. 331.

wind free, were each required to port (c); a vessel under way was required to keep clear of a vessel at anchor (d). But in modern times, rules for preventing collisions have been laid down by virtue of statutory powers (e), and it is by these rules that nearly all questions which have arisen in recent years concerning collision cases have been decided.

**REGULATIONS
UNDER THE
MERCHANT
SHIPPING
ACTS.**

By the Merchant Shipping Act, 1854, rules were laid down to regulate the navigation of sailing and steam ships (f).

(c) See as to the application of this rule, *The Jupiter*, 3 Hagg. 320. It did not apply if the heads of the vessels were not in opposite, but only in different, directions. *The London Packet*, 2 No. of Cas. 501.

(d) See the judgment in *The Girolamo*, 3 Hagg. 173; *The Batavier*, 4 No. of Cas. 356.

(e) After the introduction of steam vessels, the Trinity House issued an order dated the 30th October, 1840. The order, after stating that steam vessels might be considered as vessels navigating with a fair wind, directed that when steam vessels were on different courses, and must unavoidably or necessarily cross so near to each other that, by continuing their respective courses, there would be a risk of collision, each vessel should put her helm to port, so as always to pass on the starboard side of each other; and that a steam vessel passing another in a narrow channel should always leave the vessel she was passing on the starboard hand. [The order is printed in extenso, 1 W. Rob. p. 488.] See as to the construction of this order the judgment of Dr. Lushington in *The Friends*, 1 W. Rob. 484 (affirmed 4 Moo. P. C. C. 314). The Court of Admiralty appears to have considered that the custom of particular rivers interfering with this rule was superseded by it, *ib.*; see also *The Unity*, Swa. 101; and *The Duke of Sussex*, 1 W. Rob. 275. In *The Friends*, *nomine The General Steam Navigation Company v. Tonkin* (4 Moo. P. C. C. 314), and *The Hope* (1 W. Rob. 157), it was held, that the rules mentioned above were not to be pertinaciously adhered to where such a course would lead to a collision instead of preventing one. See also *The Immaganda Sara Clasina*, 8 Moo. P. C. C. 85.

(f) Sects. 296, 297. Regulations for the same purpose were contained in the 9 & 10 Vict. c. 100, s. 9, and the Steam Navigation Act, 1861 (14 &

15 Vict. c. 79), s. 27; the former of which acts was repealed by the 14 & 15 Vict. c. 100, s. 1, and the latter by the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120). Power was also given to the Commissioners of the Admiralty, by sect. 295 of the M. S. Act, 1854 (in substitution for similar powers contained in the repealed acts of the 9 & 10 Vict. c. 100, s. 10, and the 14 & 15 Vict. c. 79, s. 26), to make regulations as to lights and fog signals. The power thus given to the Commissioners of the Admiralty was exercised by an order dated the 24th February, 1858. This order will be found in the 2nd edition of this work, p. 402, and in Swa. App. p. vi. See also a notice of the Admiralty, dated 26th October, 1858, exempting open and fishing boats from the requirements of the order of the 24th February, 1858, and *The Olivia*, Lush. 497. See also Pritchard's Adm. Digest, 197, where the cases on this subject are carefully collected. It was held by the Court of Admiralty that the above-mentioned statutory regulations as to navigation, lights and signals contained in or made under the M. S. Act, 1854, did not apply to foreign ships on the high seas, nor to British ships which came into collision with foreign ships on the high seas, and that in such cases the question of negligence was to be governed by the general maritime law. *The Dumfries*, Swa. 63; *S. C.*, on appeal, *Thompson v. From*, 10 Moore, P. C. C. 461; Swa. 125; *The Zollverein*, Swa. 96; *The Sazonia* and *The Eclipse*, Lush. 410; *The Chancellor*, *nomine Williams v. Gutch*, 14 Moore, P. C. C. 202; and *The Wild Ranger*, Lush. 553, adopting the principles acted upon in *The Nostra Signora de los Dolores*, 1 Dods. 290. See also *Cope v. Doherty*, 4 K. & J. 367; see also *The Leon*, W. N. 1881, p. 82. In *The Cleadon*, *nomine Stevens v. Gourley*, 14 Moore, P. C. C. 92, it appears to have been considered that,

The 2nd section of the Merchant Shipping Act of 1862 repealed these rules, and the 25th section of the same Act enacted a fresh set of regulations (*g*), which, on the coming into operation of that Act, became, by section 27, binding on the owners and masters of British ships, who were thereby rendered bound to obey them, and in case of wilful default were to be deemed to be guilty of a misdemeanor (*h*). The same Act, by section 26, conferred power upon her Majesty from time to time, on the recommendation of the Admiralty and the Board of Trade, by Order in Council (*i*), to annul or modify such regulations, and provided that any alterations in or additions to such regulations so made should be of the same force as the regulations in the statute. It was not long before the power thus conferred was exercised, and in January, 1863, a series of regulations was issued by the Queen in Council, in substitution for the regulations contained in the schedule to the Act of 1862 (*j*).

Such regulations binding on British ships ;

The Merchant Shipping Act, 1862, section 57, provided that, whenever foreign ships were within British jurisdiction, the regulations for preventing collision which were for the time being in force under that Act, and all provisions of that Act relating to those regulations, or otherwise relating to collisions, should apply to such foreign ships; and that in any cases arising in any British

on foreign ships within British jurisdiction;

although a foreign vessel was governed only by the rules of the sea, a British ship in tow of a steam tug, meeting a foreign ship at night, was governed by the rules applicable to British ships.

(*g*) See the M. S. Act, 1862, schedule, Table C. By sect. 26 of the M. S. Act, 1862, the Board of Trade is bound to print these regulations and to furnish a copy to any owner or master applying for it, and they are proveable by the production of a copy signed by a secretary of the Board, or sealed with its seal.

(*h*) The 28th section of the Merchant Shipping Act, 1854, and the 17th section of the Merchant Shipping Act, 1873, which contain other provisions as to the liability entailed by infringements of the regulations, will be discussed hereafter. See *post*, pp. 627, 628.

(*i*) As to the effect of such an Order in Council, its publication, alteration and revocation, and as to the mode of proving it, see the M. S. Act, 1862, ss. 61—64, and the M. S. Act, 1876, s. 38, which provides that where her Majesty has power under the M. S. Act, 1854, or any act passed or hereafter to

be passed amending the same, to make an Order in Council, it shall be lawful for her Majesty from time to time either to make such Order in Council, and by Order in Council to revoke, alter, or add to any Order so made. The Order must be published in the London Gazette, and laid before both houses of parliament within one month after it is made, if parliament be then sitting, or if not, within one month after the then next meeting of parliament. Upon the publication of any such Order in the London Gazette, it takes effect as if enacted by parliament.

(*j*) This Order in Council, together with the copy of the regulations appended to it, will be found in the Appendix, "Orders in Council," pp. 36—41. At the same place will be found in a note (p. 37, n. (*a*)) the diagrams published by the Board of Trade to illustrate the use of the lights carried in accordance with the same regulations. A French translation of the regulations published under the authority of the French government is printed in a note at the end of the same Order in Council, Appendix, p. 41, n. (*b*).

court of justice concerning matters happening within British jurisdiction, foreign ships were, so far as regards those regulations and provisions, to be treated as if they were British ships.

on foreign
ships else-
where.

The 58th section of the same act enacts that, whenever it is made to appear to her Majesty that the government of any foreign country is willing that such regulations for preventing collisions as shall be for the time being in force under any of the provisions of the act should apply to the ships of such country when beyond the limits of British jurisdiction, her Majesty may, by Order in Council, direct that such regulations shall apply to the ships of such foreign country, whether within British jurisdiction or not. It is also now provided by the 37th section of the Merchant Shipping Act, 1876, that whenever it has been made to appear to her Majesty that the government of any foreign state is desirous that any of the provisions of the Merchant Shipping Acts, 1854 to 1876, or of any act amending the same, shall apply to the ships of such state, her Majesty may, by Order in Council, declare that such of the said provisions as are in such order specified shall (subject to the limitations, if any, contained in the order) apply, and thereupon, so long as the order remains in force, such provisions shall apply (subject to the said limitations) to the ships of such state, and to the owners, masters, seamen and apprentices of such ships, when not locally within the jurisdiction of such state, in the same manner in all respects as if such ships were British ships.

In pursuance of the power so given by the 58th section of the Merchant Shipping Act, 1862, and in consequence of communications from the government of France, the regulations made obligatory on British ships by the above-mentioned Order in Council of January, 1863, were made by the same Order in Council to apply to French ships, and by subsequent Orders in Council the same regulations were made to apply to the ships of most of the maritime countries in the world whether within British jurisdiction or not (*j*).

"End on"
rule.

In July, 1868, an Order in Council was issued explaining the

(*j*) See *supra*, p. 585, and Appendix, "Orders in Council," pp. 36, 42—44. The Regulations of Jan. 1863, were, by virtue of an act of Congress of the United States of America (38th Congress, Sess. 1, Chap. 69), and one of the above-mentioned Orders in Council (30th Nov. 1864), made applicable to ships of the United

States navigating the inland waters of North America; and by force of an act of parliament of the Dominion of Canada (31 Vict. c. 58), precisely similar regulations were made to apply to vessels navigating the rivers, lakes and other navigable waters of the Dominion of Canada.

meaning of these regulations, and attempting a definition of the phrase "end on, or nearly end on," contained in the 11th and 13th Articles of such regulations (*k*). But no foreign nation adopted the provisions contained in this further Order, and whilst the regulations of 1863 were in force, considerable doubt existed as to the application of the "end on" rule.

In September, 1880, an Order in Council made in August, 1879, under the provisions of the 25th and 58th sections of the Merchant Shipping Act, 1862, came into force annulling the former rules, and substituting for them a new series of regulations (*l*). The rules laid down by these regulations, with the exception of one rule relating to fishing vessels, are now in force, and are, by virtue of the same or subsequent orders of the 6th of September and the 27th of November, 1880, respectively, applicable in the courts of this country to the ships of nearly all the maritime nations of the world (*m*); and as questions relating to collisions must now mainly depend upon these rules, it is proposed to consider their provisions in detail, and to call attention to those cases decided under the former regulations, which seem still to be applicable.

Order in
Council of
August, 1879.

The regulations are headed "Regulations for Preventing Collisions at Sea," and, like the Regulations of 1863, seem to relate only to ships at sea (*n*).

REGULATIONS
FOR PREVENT-
ING COL-
LISIONS AT
SEA, 1879.

The text of the regulations is as follows:—

Preliminary.

ART. 1. In the following rules every steamship (*o*) which is under sail and not under steam is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam (*p*).

Definitions of
"sailing
ship" and
"ship under
steam."

(*k*) This Order in Council is printed in the Appendix, p. 44. It did not contain any statement that its provisions were applicable to foreign ships when beyond British jurisdiction.

(*l*) This Order in Council is printed in the Supplementary Appendix, pp. 173—178. A copy of the regulations, with remarks, has been published by Mr. Thomas Gray, one of the Assistant Secretaries of the Board of Trade.

(*m*) See Supplementary Appendix, pp. 173—183. Special provisions have been made with respect to the fog signals to be used on board ships

belonging to China and Japan. See *post*, p. 597, and Supplementary Appendix, p. 183.

(*n*) See *The C. S. Butler*, L. R., 4 A. & E. 238 and *post*, pp. 605, 606.

(*o*) As to the meaning of the word "ship," see the M. S. Act, 1854, s. 2; 24 Vict. c. 10, s. 2; *Ex parte Ferguson*, L. R., 6 Q. B. 280; *The Owen Wallis*, L. R., 4 A. & E. 175; and the *C. S. Butler*, L. R., 4 A. & E. 238.

(*p*) A steam-tug lying to with her engines stopped, and her helm lashed a lee, but with her steam up, is a vessel under steam. *The Jennie S. Barker*, L. R., 4 A. & E. 456.

Rules concerning Lights.

Rules as to
lights and fog
signals.

ART. 2. The lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, 9, 10 and 11, and no others (*g*), shall be carried in all weathers, from sunset to sunrise (*r*).

Lights for
steamships
under way.

ART. 3. A sea-going steamship when under way shall carry:—

(a.) On or in front of the Foremast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceed twenty feet, then at a height above the hull not less than such breadth, a bright (*s*) white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass; so fixed as to throw the light 10 points on each side of the ship, viz. from right ahead to 2 points abaft the beam on either side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(b.) On the Starboard Side, a green light so constructed as to throw an uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to 2 points abaft the

(*g*) See the M. S. Act, 1854, s. 27. Notwithstanding the prohibition of the use of lights, other than those prescribed, a ship may, in exceptional circumstances, make use of exceptional signals. Thus, although under the Rules of January, 1863, there was no provision for a stern light, yet it was held that it was proper to exhibit a stern light wherever the exhibition of such a light would be required by the ordinary practice of seamen. *The John Fenwick*, L. R., 3 A. & E. 500. *The City of Brooklyn*, 1 P. D. 276. As to the existing law as to stern lights, see Art. 11, *post*, p. 596. So a ship aground, in a fair way, must exhibit a signal to warn vessels of her position. *The Industrie*, L. R., 3 A. & E. 303. It is provided by the 8th section of the Quarantine Act (6 Geo. 4, c. 78), that masters of vessels liable to quarantine, shall at all times in the night time when meeting with any other vessel at sea, or being within two leagues of the United Kingdom, the Channel Islands, and the Isle of Man, hoist and keep hoisted at the maintop mast-head a large signal lantern with a light therein and two such lanterns with similar lights if the

vessel has the plague or any infectious disease on board. (See Supplementary Appendix, pp. 134, 135.) As to how far this section is still in force, see also the M. S. Act, 1854, s. 27, and Art. 24, *infra*, p. 605.

(*r*) The Regulations of 1863 were said not to be obligatory upon her Majesty's ships. See the M. S. Act, 1854, s. 4; H.M.S. *Supply*, 12 L. T., N. S. 799; H.M.S. *Topaze*, 12 W. R. 923; H.M.S. *Amazon*, W. N., 1867, p. 60; and H.M.S. *Bellerophon*, 44 L. J., Adm. 5. Instructions precisely in accordance with such regulations were, however, issued by the Commissioners of the Admiralty to the navy, and in actions of collision in Admiralty, against the commanders of Queen's ships, it has been invariably admitted that the non-observance of the rules embodied in such instructions was negligence. As to the applicability of the Regulations of 1879 to Queen's ships, see *post*, p. 606.

(*s*) It has been regretted that no definition has been given in any of these regulations of a "bright light." See the judgment in *The Fortune*, *nomine Mackay v. Roberts*, 9 Moo. P. C. C. 357.

beam on the starboard side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c.) On the Port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(d.) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow (t). Side screens.

The first of the two preceding articles is substantially the same as the corresponding article of the Regulations of 1863, and so is Art. 3, with the exception that in the former Regulations the position in which the bright white light for steamers was to be carried was described to be "at the foremast head" (u).

The words "under way" which occur in Article 3, are also contained in Article 6, which relates to sailing ships under way, and it will be convenient to consider the meaning of the words in this place. A vessel making way through the water is under way (x). A sailing vessel hove to is under way (y). A vessel driven from her anchors in a gale of wind, even if wholly unmanageable, is under way (z); and a vessel dropping with the tide, although she may have an anchor overboard, is under way so long as she is not held by her anchor (a). Meaning of "under way."

(t) As to the effect of a slight deficiency in the length of the screens, see *The Fanny M. Carvill*, L. R., 4 A. & E. 422; 44 L. J., Ad. 34. If the side lights are carried away by tempestuous weather, others must be provided at the first opportunity. *The Aurora*, Lush. 328. It would seem that a large steamer ought to be provided with a spare set of regulation lights. See *The Sylph*, 2 Spk. 75; *The Rob Roy*, 3 W. Rob. 190; *The C. M. Palmer*, 2 Asp. Mar. Law Cas. 94.

(u) *The Telegraph*, 8 Moo. P. C. C. 167; 8 C. 1 Spk. 427, 432, which was a decision upon the Admiralty rules made under the 14 & 15 Vict. c. 79. In that case the light of a sailing vessel at anchor had been placed on

the mizzen rigging instead of at the mast-head, as required by the regulation, and the Court of Admiralty being of opinion that the light was more visible in this position than at the mast-head, had decided that there had been a substantial compliance with the rule. In the Privy Council, however, this decision was reversed, that Court holding that there had been a non-observance of the statutory rule, and that the collision had been caused thereby.

(x) See the concluding part of Art. 5, *infra*, p. 591.

(y) *The Rosalie*, 5 P. D. 245; *The City of London*, Swa. 248.

(z) *The George Arkle*, Lush. 382.

(a) *The Esk*, L. R., 2 A. & E. 350.

Position of
side lights.

It is to be observed that the Article does not fix any place on the respective sides of the ship for the lights to be carried. They may be fixed in the rigging or on stanchions, so long as they are placed so as to be properly visible and are properly screened (*b*). But they must not be obscured by the hull or by the sails of the ship within the required radius (*c*).

There is no definition of the word "miles," and it is uncertain whether the word means statute miles or nautical miles. It is submitted, however, that the miles intended are nautical miles, because as the regulations apply to the ships of all nations, it would give rise to great inconvenience if the application of the Article varied with the measures of length adopted by each country.

Lights for
steamships
towing.

ART. 4. A steamship, when towing another ship, shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than three feet apart, so as to distinguish her from other steamships. Each of these lights shall be of the same construction and character, and shall be carried in the same position, as the white light which other steamships are required to carry.

This is the same as Article 4 of the earlier Regulations save that the distance between the lights was not specified in the old rule.

Lights for
telegraph
ships, and
ships not
under com-
mand.

ART. 5. A ship, whether a steamship or a sailing ship, when employed either in laying or in picking up a telegraph cable, or which from any accident is not under command, shall at night carry in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than 10 inches in diameter, in a vertical line one over the other, not less than three feet apart: and shall by day carry in a vertical line one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

(*b*) *The James C. Stevenson*, *nomine* *The Bougainville*, L. R., 5 P. C. 316. See *The City of Carlisle*, Br. & L. 363; *The Urania*, Swa. 253; *The Mangerton*, Swa. 120. The rule must not only be obeyed, but obeyed in time to avoid an impending collision. *The Fenham*,

L. R., 3 P. C. 216.

(*c*) *The Tirzah*, 4 P. D. 33; *The Magnet*, L. R., 4 A. & E. 417; *The Fanny M. Carvill*, on appeal, 44 L. J., Adm. 34. See also *The Germania*, 37 L. J., Adm. 59; *S. C.*, on appeal, 21 L. T., N. S. 44.

These shapes and lights are to be taken by approaching ships as signals that the ship using them is not under command, and cannot therefore get out of the way.

The above ships, when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

This regulation is entirely new (*d*). The words "from any accident" seem to govern the words "not under command," so that it seems that a ship not under command within the meaning of the second branch of the Article is only bound to exhibit these signals when she has been disabled by an accident. It is apprehended that a ship hove to is not under any obligation to exhibit these signals. A ship accidentally aground should, it would seem, exhibit these signals.

ART. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steamship under way, with the exception of the white light, which she shall never carry. Lights for sailing ships under way or being towed.

It is to be observed that a sailing ship towing another ship is not to carry white lights.

ART. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. Side lights of small vessels.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

This Article seems to apply to decked vessels only. Article 10 applies to open boats (*e*).

(*d*) Under the former regulations it was held that a vessel driven from her anchors in a gale of wind, even if wholly unmanageable, was bound to exhibit coloured side lights. *The George Arkie*, Lush. 382.

(*e*) See *post*, pp. 592, 595, 596. A

regulation in substance the same as Art. 7 was contained in the third of the Admiralty Regulations of 24th of February, 1858, applicable to sailing vessels. See *The Livingstone*, Swa. 519; *The Calla*, *ib.* 465. See also *The Tirzah*, 4 P. D. 33.

fresh Convention respecting the sea fisheries in the English Channel. But although this fresh Convention was not ratified by the French government, its terms were embodied in the schedule to the Sea Fisheries Act, 1868 (*o*), and that act rendered such of the provisions of the Convention in question as related to lights compulsory upon British fishing vessels engaged in drift-net fishing within the limits defined in the Convention, in the same manner as if such provisions were regulations respecting lights within the meaning of the acts relating to merchant shipping (*p*).

As, however, the regulations in this last-mentioned Convention were not consistent with the Regulations for Preventing Collisions at Sea of January, 1863, great uncertainty prevailed as to the proper lights to be carried by British Sea fishing vessels; and apparently with a view to remedy the confusion thus occasioned, the Sea Fisheries Act, 1875 (*q*), provided that nothing in the Sea Fisheries Act, 1868, should be deemed to repeal or alter any of the regulations for preventing collisions at sea contained in the schedule to the Merchant Shipping Act, 1862, or to take away or diminish the power of her Majesty in council to annul or modify any of the said regulations, and to make new regulations in addition thereto or in substitution therefor (*r*). But it is to be observed that, apparently by some oversight, no allusion is made by the Sea Fisheries Act of 1875 to the Regulations of January, 1863, to the provisions of which it is to be presumed the framers of the act intended its provisions to apply, and it is impossible to say with certainty what the exact effect of this last enactment may be.

38 Vict. c. 15.
40 & 41 Vict.
c. 42.

In 1877, an act, called the Fisheries (Oyster, Crab and Lobster) Act, 1877 (*s*), was passed, which revived, so far as French sea fishing boats were concerned, the provisions of the act of parliament confirming the Articles made in 1843 under the provisions of the Convention of 1839. The provisions as to lights (*t*) contained in the Regulations so revived are certainly inconsistent with the Regulations for preventing Collisions at Sea of January, 1863; and the Regulations for preventing Collisions at Sea of 1879, although they refer to the Convention

(*o*) 31 & 32 Vict. c. 45, Appendix, p. cclxxix. See also Appendix, p. cclxxx, note, p. cclxxxix, note (*m*).
(*p*) Sect. 20, Appendix, p. cclxxxiii.
(*q*) 38 Vict. c. 15, Appendix, p. cccxxxii.

(*r*) Sect. 3, Appendix, p. cccxxxii.
(*s*) 40 & 41 Vict. c. 42 (Appendix, p. cccliv).
(*t*) 40 & 41 Vict. c. 42, Sched. Arts. LII., LIII., LIV. (Appendix, p. ccclxii).

of 1868, contain no reference either to the Articles made in 1843 under the provisions of the Convention of 1839, or to the Act of 1877.

It is needless to speculate as to what extent the 10th Article of the Regulations of 1879 would have abrogated or modified the complicated provisions above referred to had it come into operation, for by an Order in Council of the 24th of March, 1880, it was provided that that Article should not come into force until September, 1881, and that in the meantime the 9th Article of the Regulations of January, 1863, should remain in force (*u*). It is to be hoped that before September, 1881, some measures will be taken to remove the existing anomalies, and to apply to all sea fishing vessels uniform and unambiguous enactments (*x*).

Order in
Council of
March, 1880.

(*u*) This Order in Council will be found in the Supplementary Appendix, at p. 178.

(*x*) A Committee appointed by the Admiralty, the Board of Trade, and the Trinity House to reconsider the provisions of the 10th article of the Regulations of 1879 have recently (Jan. 5, 1881) recommended that in place of such article and of Article 9 of the Regulations of 1863, an article in the following shape should be adopted:

Art. 10. (*a*.) All fishing vessels and fishing boats of 20 tons net registered tonnage, or upwards, when under way and when not having their nets, trawls, or lines then in the water, shall carry and show the same lights as other vessels under way.

(*b*.) Open boats and fishing vessels of less than 20 tons net registered tonnage, when under way, and when not having their nets, trawls, or lines in the water, shall not be obliged to carry the coloured side lights; but every such boat and vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

(*c*.) A vessel or boat employed in drift net fishing, when drifting with her nets, shall not show the coloured side lights; but in lieu thereof shall carry two white lights, in lanterns so constructed that the lights will show

all round the horizon, and be visible on a dark night with a clear atmosphere at a distance of not less than three statute miles; and these lights shall be exhibited where they can best be seen, and so that one of them is at least six feet higher than, but not necessarily immediately over, the other.

(*d*.) A trawling vessel at work and attached to her trawl shall not show the coloured side lights, but shall carry a red light over a white light, both lights in lanterns so constructed that the lights will show all round the horizon, and be visible on a dark night in a clear atmosphere at a distance of not less than two statute miles. The red light shall be not less than six feet higher than the white light; it shall be exhibited at the foremast head, or in any other position on or in front of the foremast where it can best be seen; and the white light shall be exhibited in any position in the after part of the vessel where it can best be seen.

(*e*.) If a trawling vessel at work becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light required to be shown by a vessel at anchor.

(*f*.) Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this Article required to carry and show.

(*g*.) Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a

Revival of regulations of 1863 as to lights for fishing vessels.

The 9th Article of the Regulations of January, 1863, which is thus temporarily in force, is as follows:—"Open fishing boats, and other open boats, shall not be required to carry the said lights required for other vessels; but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side; and on the approach of or to other vessels such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light (y). Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient" (z).

Lights to be shown by overtaken ships.

ART. 11. A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

This Article is new. It was a common custom of seamen of a vessel that was being overtaken by another at night to show a light astern. But, until the present rule was enacted, there was no express provision on the subject. It was held, under the former Regulations, that there was no duty to exhibit a stern light unless there was apparent danger (a).

Sound Signals for Fog, &c.

Fog signals for steamships and sailing ships.

ART. 12. A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog horn to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar fog horn and bell (b).

white light, visible all round the horizon at a distance of at least one statute mile. (Parliamentary Papers, sess. 1881, H. C. No. 78.)

(y) See *The Englishman*, 3 P. D. 18; *The Edith*, L. R. Irish, 10 Eq. 345: cases decided on this Article.

(z) Appendix p. 40.

(a) *The City of Brooklyn*, 1 P. D. 276; *The Earl Spencer*, L. R., 4 A. & E. 431; *The John Fenwick*, L. R., 3

A. & E. 500.

(b) The corresponding Article of the Thames Regulations (see *infra*, p. 610, and Supplementary Appendix, p. 186) does not require a steam vessel to be provided with a fog-horn, or that the fog-horn required for sailing vessels should be sounded by mechanical means. See Supplementary Appendix, p. 186.

In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows; that is to say,

- (a.) A steamship under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast (c).
- (b.) A sailing ship under way shall make with her fog horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.
- (c.) A steam ship and a sailing ship when not under way shall, at intervals of not more than two minutes, ring the bell.

This Article differs from the former Regulations in the following respects:—it allows a steamship to use any efficient steam sound signal, and requires a steamship to be provided with a fog horn. The sound signal may be placed anywhere in the vessel where the sound will not be intercepted instead of before the funnel, and at a specified distance from the deck. The fog horn to be carried by steamers and sailing vessels is required to be a horn to be sounded by mechanical means.

The words "mist or falling snow" are not in the former Regulations, and the provisions in sub-sections (a.) and (b.) are new. The intervals between the signals are reduced to two minutes. The words of the old Article were "at least every five minutes."

By an Order in Council of the 27th of November, 1880 (d), it is provided that, as regards (1) Japanese and (2) Turkish ships, the last-mentioned Article shall be modified as follows, viz.:

- (1) It shall not be necessary for the fog horn by the said Article required to be provided and used on board steam and sailing ships as a sound signal for fog, &c., to be sounded by a bellows or other mechanical means when the same is carried on board ships belonging to Japan;

Special fog signals for Japanese and Turkish ships.

And (2) It shall not be necessary for the bell, required by the said Article to be provided and used on board steam

(c) Care should be taken that the blasts are prolonged blasts, otherwise they may be mistaken for signals under Article 19. See *post*, p. 602.

(d) The Order in Council in question is printed in the Supplementary Appendix, pp. 181—183.

and sailing ships as a sound signal for fog, &c., to be placed and kept on board Turkish ships, but that in lieu thereof and in substitution therefor, there may be placed and kept on board such Turkish ships an efficient drum, which shall be sounded under the same circumstances and at the same intervals as by the said Article a bell is required to be rung.

Speed of Ships to be moderate in Fog, &c.

Speed in fog,
mist, or snow.

ART. 13. Every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

The former Regulations contained a similar rule, which however applied to steamships only, and did not contain the words "mist or falling snow."

Moderate speed is an indefinite term, and it is not capable of being accurately defined. But it may be held to mean such a speed as, while sufficient to secure steerage way, is yet not too great to enable a vessel having a proper look-out after discovering another vessel to avoid her (*d*).

Irrespective of the provisions of this Article, it is the duty of a vessel in a dense fog to anchor as soon as she reaches anchorage ground (*e*). In a case where a ferry boat started in a dense fog to cross a navigable river with the knowledge that vessels were anchored in or near her track, she was held to blame for coming into collision with a vessel at anchor in the river, notwithstanding that she was being navigated with all ordinary care (*f*).

Steering and Sailing Rules.

Rules to be
observed by
sailing ships
approaching.

ART. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz. :—

(a.) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(b.) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(*d*) *The Frankland*, L. R., 4 P. O. 529; *The Itinerant*, 2 W. Rob. 236; *The Girolamo*, 3 Hagg. 169; *The Juliet Erskine*, 6 No. Ca. 633; and see *The Batavier*, 1 Spks. 378; *The Lord*

Saumaurez, 6 No. Ca. 600.

(*e*) *The Perth*, 3 Hagg. 414; *The Otter*, L. R., 4 A. & E. 203.

(*f*) *The Lancashire*, L. R., 4 A. & E. 198.

(c.) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(d.) When both are running free with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.

(e.) A ship which has the wind aft shall keep out of the way of the other ship.

The rule contained in Art. 11 of the Regulations of 1863, which required sailing ships meeting end on to port is not contained in the new Regulations, and the rules now applicable to sailing ships approaching one another are the same whether the ships are meeting or crossing.

Risk of collision means a probability or reasonable chance of collision (*g*). When there is no probability of a collision the rule does not apply, although if there is any danger of a collision the master of a vessel should not hesitate to adopt the proper measures (*h*).

Meaning of risk of collision.

It is especially important to observe that the ship required to keep out of the way of another is left free to do so in any manner she may think fit (*i*). In judging of the manœuvre to adopt, those in charge of the ship required to keep out of the way of the other are justified in assuming that the other will keep her course (*k*).

Keep out of the way.

The phrase "running free" is introduced into the Regulations for the first time. The old rules used the phrase "ship free." A ship cannot strictly be said to be "running" unless she has the wind aft, and the phrase "running free" is a somewhat inaccurate expression, because a ship running must always be free. Probably, however, "running free" is used as opposed to close-hauled, because otherwise the Regulations make no provision for a case of two ships approaching, one of which is close-hauled and the other has the wind abeam.

Running free.

The expression "close-hauled" is not confined to a vessel sailing as close as possible to the wind; it may be applied to a vessel

Close-hauled.

(*g*) *The Sylph*, 2 Spks. 75; *The Ericson*, Swa. 38; *The Mangerton*, Swa. 120.

(*h*) *The Colonia*, 3 No. Ca. 13, note; *The General Steam Navigation Company v. Mann*, 14 C. B. 127; *The Jeumont*,

L. R., 4 P. C. 1.

(*i*) See *The Elizabeth Jenkins*, L. R., 1 P. C. 501; *The James C. Stevenson*, L. R., 5 P. C. 316, 323.

(*k*) See Article 22, *post*, p. 604.

on a wind, although she may be able to luff a point or more without losing steerage-way (*l*).

Rules for
steamships
meeting.

Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases to which each ship is in such a position as to see both the side lights of the other.

It does not apply by day, to cases in which a ship sees another ahead crossing her own course; or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

This Article is in substance the same as Article 13 of the former Regulations read together with the Order in Council of the 30th July, 1868 (*m*), defining the meaning of "end on or nearly end on." The phrase "each shall alter her course to starboard" is substituted in the present rule for the phrase in the former Regulations, "the helms of both ships shall be put to port."

The great difficulty with regard to this rule is to define the ambiguous words "end on or nearly end on." If the definition given by the rule itself were to be literally construed, and the rule were held to apply only to cases where by night each ship saw both the side lights of the other at once, it could only apply where the ships were meeting exactly end on, and no

(*l*) *Chadwick v. The City of Dublin Steam Packet Company*, 6 E. & B. 771.

(*m*) See Appendix, p. 44, and *supra*, p. 586.

meaning could be given to the words "nearly end on." But no doubt the courts will endeavour to put a reasonable construction on the words of the rule (n).

ART. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other. For steam-ships crossing.

This is identical with Article 14 of the earlier Regulations.

It is exceedingly difficult to say what ships are crossing ships (o). It would seem that whenever ships are approaching one another otherwise than end on, and one is not overtaking the other within Article 16, that they are to be deemed crossing ships. But there is great difficulty in distinguishing between a crossing ship and an overtaking ship, which is provided for by Article 20. When one ship is a little before or aft of the beam of another, and some distance from her, and overhauling her, and heading so as to cross her course, it is difficult to say that the first-mentioned ship is not an overtaking as well as a crossing vessel. But it would seem that wherever a vessel is an overtaking vessel, even although she may be a crossing vessel also, the provisions of the 20th Article of the Regulations of 1879 would rule the case (p).

ART. 17. If two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship. Where risk of collision between steamships and sailing ships.

This is the same as Article 15 of the former Regulations.

This rule renders it incumbent upon a steam ship to do whatever can be done to avoid a collision (q). It has been held

(n) See *The Black Prince*, *nomine The General Iron Screw Co. v. Moss*, 15 Moo. P. C. C. 122; *The Cleopatra*, Swa. 135; *The Constitution*, *nomine Dean v. Mark*, 2 Moo. P. C. C., N. S. 453; *The Independence*, Lush. 277.

(o) *The Velocity*, L. R., 3 P. C. 44; *The Cologne*, L. R., 4 P. C. 519; *The Njord*, L. R., 3 P. C. 436. All these cases arose with reference to collisions in the River Thames, but similar rules to those in force on the high seas under the Regulations of 1863 seem (probably, under the principle laid down in *The Fynenoord*, Swa. 374, see *post*, p. 606,

note (j)) to have been held to apply. See *The Oceano*, 3 P. D. 60, which is a case decided on a similar Article contained in the Thames Bye-laws in force in 1872. See Appendix, p. 55.

(p) *Post*, p. 603. See *The Franconia*, 2 P. D. 8; *The Peckforton Castle*, 3 P. D. 11. See also *The Falkland*, Br. & L. 204.

(q) *The City of Antwerp*, L. R., 2 P. C. 25. The following passage occurs in the judgment delivered in this case:—"When a steamer is condemned for having omitted to do something which she ought to have done,

that this rule applied to a steamship towing a disabled vessel of large tonnage against a strong head wind (*p*), and to a steam tug lying to (*q*).

But a steamship should not rashly adopt a decisive movement at a time when she cannot make out the course of the approaching vessel (*r*).

Duty of steamship to slacken or stop and reverse.

ART. 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

This Article, with a slight verbal variation, is the same as the first part of Article 16 of the earlier Regulations.

It would seem that the risk of collision in this rule means such a risk of collision as cannot be avoided without slackening speed or stopping and reversing. If a steamship can obviously avoid the risk of collision by porting or starboarding, she is not under any obligation to slacken speed or stop and reverse (*s*). But where there is any doubt as to the ability of the steamship to avoid the risk by other means, it is her duty to slacken speed or stop and reverse if necessary (*t*). When a steamship approaching another vessel comes into collision with her, the fact of the collision having happened will, in nearly all cases, be regarded as proof that there was such a risk of collision as rendered it incumbent upon the steamer to slacken speed or stop and reverse (*u*).

Optional steam whistle signals.

ART. 19. In taking any course authorized or required by these Regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.:—

One short blast to mean "I am directing my course to starboard."

it seems just to require clear proof of three things for a breach of this rule; three things must be proved—first, that the thing omitted to be done was clearly within the power of the steamer to do; secondly, that if done it would in all probability have prevented collision; and thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer." See also *The Velasquez*, L. R., 1 P. C. 494.

(*p*) *The American and Syria*, L. R., 6 P. C. 127. See *The Warrior*, L. R.,

3 A. & E. 553.

(*q*) *The Jonnie S. Barker*, L. R., 4 A. & E. 456.

(*r*) *The James C. Stevenson*, L. R., 5 P. C. 316; *The General Lee*, L. R. Irish, 3 Eq. 155; *The James Watt*, 2 W. Rob. 270.

(*s*) *The Jeomond*, L. R., 4 P. C. 1.

(*t*) *The Frankland*, L. R., 4 P. C. 529; *The James C. Stevenson*, L. R., 5 P. C. 316; *The Great Eastern*, 3 Moo. P. C. C., N. S. 31; Br. & L. 287.

(*u*) *The Khedive*, 5 App. Ca. 876, 902.

Two short blasts to mean "I am directing my course to port:"

Three short blasts to mean "I am going full speed astern."

The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made.

This Article is new; but the signals have been much used in American waters for some years.

ART. 20. Notwithstanding anything contained in any preceding Article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship.

Obligation on overtaking ship to keep out of the way.

This rule takes the place of Article 17 in the former Regulations. The words "notwithstanding anything contained in any preceding Article" are new. By the force of these words, this rule where it applies displaces the operation of any of the earlier Articles inconsistent with it (*x*).

ART. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

Rule of navigation in narrow channels.

This Article contains, in substance, the same provisions as were by virtue of the 297th section of the Merchant Shipping Act, 1854, in force prior to 1862, with respect to steamships "when navigating" narrow channels (*y*).

(*x*) See *supra*, p. 601.

(*y*) The 297th sect. of the M. S. Act, 1854, was held in the Privy Council to be applicable under ordinary circumstances to vessels in tow. *The La Plata*, Swa. 220, 298. It was also held that the custom of a particular river could not be set up as an excuse for disobeying the provisions of that section. *The Unity*, Swa. 101; *The Hand of Providence*, Swa. 107; see also *The Nimrod*, 15 Jurist, 1201; and *The Sylph*, 2 Spks. 75, decided under a similar provision in the 14 & 15 Vict. c. 79. For other cases decided on the M. S. Act, 1854, s. 297, see Appendix, p. cccxxix, *note* (*f*). In a previous statute (9 & 10 Vict. c. 100), the words

"due regard being had to the tide and the position of each vessel in such tide" were added to the rule, but this additional provision was designedly removed by the Legislature. *The Sylph*, 2 Spks. 75. The channel or water between the Bell buoy and the buoys of the Queen's Channel leading to the port of Liverpool was held not to be a narrow channel within the meaning of the 297th section of the M. S. Act, 1854 (*The Meander*, Br. & L. 29); but it is now provided by the 37 & 38 Vict. c. 52 (*post*, p. 607), that a similar rule to that contained in this section shall apply to the sea channels of the River Mersey as there defined.

What ships to keep their course.

ART. 22. Where by the above Rules one of two ships is to keep out of the way, the other shall keep her course (s).

This is substantially the same as Article 18 of the old Regulations, and in effect it is identical. This Article is the necessary consequence of the rules laid down in Articles 16 and 17 (a), because while the obligation of keeping out of the way is cast upon one of the two approaching ships, and the ship charged with that obligation is allowed to keep out of the way in whatever manner she may think best, it is obvious that it would embarrass her movements if she were to be left in doubt as to the course to be followed by the vessel she is seeking to avoid. But important as the rule is, it is one which it is sometimes difficult to carry out in practice, because for a vessel to hold her course when the approaching vessel neglects to keep out of the way, may be to run into certain danger. As we shall see hereafter, however, by the operation of the next Article, a vessel is not bound to continue to keep her course when it becomes obvious that to do so would bring about a collision, which might be avoided if she altered her course. Thus it has always been held that at the last moment a vessel may alter her course to avoid a collision, or to ease the blow (b).

Dangers of navigation, and special circumstances to be regarded.

ART. 23. In obeying and construing these rules due regard shall be had to all dangers of navigation; and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

This is in substance the same as Article 19 of the former Regulations.

This rule only justifies a departure from the preceding rules in exceptional cases where such departure is necessary in order to avoid immediate danger (c); and where a vessel seeks to justify such a departure the onus of proving that circumstances existed to render the departure necessary rests with her (d). But

(a) As to the meaning of the phrase "keep her course," see *The Velocity*, L. R., 3 P. C. 44; *The Niord*, L. R., 3 P. C. 436; *The Ranger*, L. R., 4 P. C. 519; *The Elizabeth Jenkins*, L. R., 1 P. C. 501; *The Great Eastern*, 3 Moo. P. C. C. (N. S.) 31; Br. & L. 287; *The Marmion*, 1 Asp. Mar. Law Cases, 412; *The Falkland*, Br. & L. 204.

(a) *Supra*, p. 601.

(b) *The Lady Ann*, 15 Jur. 18; *The Virid*, 7 No. Ca. 127; *The General Lee*,

L. R. Irish, 3 Eq. 155. See also *The Bywell Castle*, 4 P. D. 219; *The Khedive*, *nomine Stoomvaart Maatschappij Nederland v. P. & O. Steam Co.*, 5 App. Ca. 876.

(c) *The Elizabeth Jenkins*, L. R., 1 P. C. 501; *The Great Eastern*, 3 Moo. P. C. C. (N. S.) 31; Br. & L. 287; *The Moderation*, *nomine Dryden v. Allis*, 1 Moo. P. C. C. 528.

(d) *The Concordia*, L. R., 1 A. & E. 93; *The Spring*, L. R., 1 A. & E. 99; *The Velasquez*, L. R., 1 P. C. 494; *The*

where circumstances exist which make it certain that a vessel, by adhering to the Regulations, will bring about a collision, whilst by a departure from the Regulations the collision may certainly be avoided, it is the duty of a vessel to depart from the Regulations (g).

No Ship, under any circumstances, to neglect proper Precautions.

ART. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precautions which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Precautions required of seamen not to be disregarded.

This Article is identically the same as Article 20 of the former Regulations. The object of this Article is to make it clear that the Regulations are not intended to form a complete code prescribing the duty of vessels under all circumstances, but that the precautions required by the ordinary practice of seamen are to be observed in addition to the rules laid down by the Regulations (h).

Reservation of Rules for Harbours and Inland Navigation.

ART. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by Local Authority,

Local harbour, river or inland navigation rules not superseded.

Great Eastern, 3 Moo. P. C. C., N. S. 31; *The John Buddle*, 5 No. of Cas. 387, in the judgment in which case is the following passage:—"But all rules are framed for the benefit of ships navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule however wisely framed. It is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and not to allow a deviation from them unless the circumstances which are alleged to have rendered such deviation necessary are most distinctly proved and established; otherwise vessels would always be in doubt and doing wrong." See also *The Khedive*, 5 App. Cas. 876, and *The Immagenda Sara Clasina*, 7 No. of Ca. 585; *S. C.* on appeal, *nomine Vaux v. Sheffer*, 8 Moo. P. C. C. 75.

(g) *The Hope*, 1 W. Rob. 157; *The Blenheim*, 1 Spks. 289; *The Ida*, 2 Mar. Law Cas. 414, and the judgment in *The Anglo-Indian*, 2 Mar. Law Cas. 239, where Dr. Lushington said, "You may

depart, and must depart, from a rule if you see with perfect clearness almost amounting to certainty that adhering to the rule will bring about a collision and violating a rule will avoid it; and, indeed, this is provided for by the 19th Article." To the same effect is the following passage:—"No one can deny the truth of that proposition, put broadly, that you have no right to stand, in a difficulty, upon a right, though it may be a perfectly good right, obstinately, recklessly, and regardless of the safety of others. . . . But, in common justice, when charging a vessel with inactivity and not adopting measures to avoid a collision, we must be satisfied that the master of the vessel so charged was perfectly convinced of the imminent danger of a collision taking place, and had it in his power to adopt a safe measure to avoid the collision." *The Emily*, Holt's Rule of the Road, p. 217; *The Independence*, Lush. 270. But see *The Byfoged Christiansen*, 4 App. Ca. 669.

(h) See *The Oceano*, 3 P. D. 60; and the cases referred to post, p. 611.

relative to the navigation of any harbour, river, or inland navigation.

The effect of this rule seems to be to make local regulations in the waters, for which they are in force, supersede the general Regulations. It seems to have been framed by way of precaution lest any conflict should arise between the general Regulations and regulations made by any local authority relative to the navigation of the waters under the jurisdiction of such local authority. Provisions similar in effect to this rule are contained in the 31st section of the M. S. Act, 1862.

The rules in force relative to the navigation of harbours, rivers, and inland navigations will be discussed hereafter (i).

Special Lights for Squadrons and Convoys.

Saving for station lights for ships of war and ships under convoy.

ART. 26. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war, or for ships sailing under convoy.

This Article is new. The Regulations for preventing collisions at sea have never been held to be binding by force of law upon Queen's ships, although instructions containing the same rules as the Regulations for the time being in force are issued from time to time by the Commissioners of the Admiralty for the guidance of the officers in charge of such ships (k).

Ships of war of foreign nations, when they have submitted themselves to the jurisdiction of the Admiralty Court, have it

(i) See *infra*, p. 609. There are many rivers in the United Kingdom where no such rules as those referred to in the above Article are in force. In the case of a collision in these rivers it is difficult to determine at what point the Regulations for preventing Collisions at Sea cease to be applicable. Where a collision occurred in the River Humber near the Flat Holme Sand between two steamships, one of which had her side lights obscured contrary to the Regulations for preventing collisions at sea, it was held by the Privy Council, no evidence having been given of any local regulations applicable to the Humber, that the steamship whose side-lights were so obscured was in fault for the collision under the provisions of the 17th section of the M. S. Act, 1873, on the ground of her having infringed a

regulation made under the M. S. Act, 1862, within the terms of that section. *The Germania*, P. C. June 17, 1876. See also *The Swanland*, 2 Spks. 107. As to the effect of customary rules with respect to the navigation of a particular river, see *The Fynenoord*, Swa. 374, where it was held that although the provisions of the M. S. Act, 1864, were not applicable to foreign ships in the Thames, yet that the Court would presume that a customary course of navigation emanated from the rules of navigation contained in that statute, and that that course was binding on foreign ships. See also *The Smyrna*, *nomine The Imperial*, &c. *Danubian Steam Navigation Co. v. The Greek and Oriental Steam Navigation Co.*, 2 Moo. P. C. C., N. S. 447.

(k) See *supra*, p. 588, note (r).

seems always consented to be judged by the Regulations applicable to merchant ships (*k*).

In order to enforce a compliance with the above Regulations for preventing collisions at sea, on the masters and owners of British ships, the Merchant Shipping Act, 1862, provides, by sect. 30, that surveyors or other persons appointed by the Board of Trade may inspect any ship for the purpose of seeing that she is properly provided with lights and fog signals; and that if the surveyor finds that she is not properly provided in these respects, he shall give notice in writing to the master or owner, pointing out the deficiency, and also what, in his opinion, is requisite in order to remedy it. Every notice so given must be communicated to the collector of customs at any port from which the ship seeks to clear, or at which her transire is to be obtained, and no collector of customs to whom such a communication has been made may clear the ship or grant her a transire without a certificate signed by one of the surveyors of the Board of Trade that she is properly provided with lights and fog signals in pursuance of these regulations (*l*).

INSPECTION OF
SHIPS AS TO
LIGHTS, ETC.

By the Mersey Sea Channels Act, 1874 (37 & 38 Vict. c. 52), special regulations are enacted for preventing collisions in the sea channels leading to the River Mersey, and it is provided that any general regulations for preventing collisions at sea for the time being in force under the provisions of the Merchant Shipping Acts shall be construed as if the following regulations were added thereto; that is to say:—

REGULATIONS
FOR PREVENT-
ING COLLISIONS
IN THE MER-
SEY SEA
CHANNELS.

1. Every steamship, and every vessel in tow of any steamship, when navigating in the sea channels or approaches to the River Mersey between the Rock lighthouse, and the furthest point seawards to which such sea channels or approaches respectively are for the time being buoyed on both sides, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship or vessel in tow (*m*).
2. Every ship at anchor in the said sea channels or approaches within the limits aforesaid shall carry the single white

(*k*) See *The Lord Byron*, Adm. Div. Nov. 10, 1879.

(*l*) See Appendix, "Forms," No. 46, where the form of the certificate is printed. As to the appeal to a Court

of Survey from a refusal to grant this certificate, see the M. S. Act, 1876, s. 14, and *supra*, p. 39, and *infra*, Chap. XI., PASSENGERS.

(*m*) Appendix, p. cccxxviii.

light prescribed by Article 7 (n) of the General Regulations for preventing collisions at sea, made under the authority of the Merchant Shipping Act Amendment Act, 1862, at a height not exceeding twenty feet above the hull, suspended from the forestay or otherwise near the bow of the ship where it can be best seen; and in addition to the said light, all ships having two or more masts shall exhibit another similar white light at double the height of the bow light at the main or mizzen-peak, or the boom topping lift, or other position near the stern, where it can be best seen (o).

**REGULATIONS
AS TO DOCK-
YARD PORTS.**

By virtue of the 3rd and 5th sections of the Dockyard Ports Regulation Act, 1865, the Queen in Council is empowered to define the limits of any dockyard port (p), and to make regulations for, amongst other things, the prohibiting the mooring or anchoring of vessels so as to obstruct the navigation of the port, and the navigating of vessels in any part of the port at a greater speed than is specified in such Regulations.

It is provided by sect. 7 of the same act that in relation to any dockyard port it shall be lawful for her Majesty in Council, by Order in Council, on the joint recommendation of the Admiralty and the Board of Trade, to make rules concerning the lights or signals to be carried or used, and the steps for avoiding collisions to be taken by her Majesty's vessels and other vessels navigating the waters of the port and of the approaches thereto; and such rules shall, with respect to her Majesty's vessels and other vessels navigating those waters, have the same effect as if they had been regulations originally contained in Table C. in the schedule to the Merchant Shipping

(n) See Order in Council of the 9th of January, 1863, Schedule Art. 7 (Appendix, p. 40).

(o) If these regulations are infringed, and it is proved that the infringement might possibly have contributed to the collision, the same consequences will follow as if a similar infringement of the regulations for preventing collisions in force under the M. S. Acts had taken place, and the ship guilty of the infringement will be deemed in fault for the collision, under the M. S. Act, 1873, s. 17. See *The Lady Downshire*, 4 P. D. 26; and *post*, p. 628, note (y).

(p) 28 & 29 Vict. c. 125; Appen-

dix, p. cclx. The act in sect. 2 defines "dockyard port" to mean any port, harbour, haven, roadstead, sound, channel, creek, bay or navigable river of the United Kingdom, in, on or near which her Majesty has or shall have any dock, dockyard, steam factory, yard, victualling yard, arsenal, wharf, or mooring. The same section of the act defines "vessel" to include ship, boat, lighter and craft of every kind, however propelled; and sects. 8 and 9 provide for the printing by the Admiralty of copies of all Orders in Council under the act, and for their publication and admission in evidence. See Appendix, pp. cclx, cclxi.

Act, 1862, or were regulations duly substituted for the same, and as if such original or substituted regulations applied to her Majesty's vessels as well as to other vessels (*q*).

Several Orders in Council have been issued under this act. All of them have apparently been issued under the 3rd and 5th, and not under the 7th section, of the act. Some of such Orders in Council contain provisions as to the speed at which steam ships may be navigated within the limits of the dockyard ports to which they relate (*r*).

By the Merchant Shipping Act, 1862, sect. 31, it is provided that all rules concerning lights or signals to be carried by vessels navigating any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made under the authority of any local act, are to continue in full force notwithstanding the provisions of the Merchant Shipping Act, 1862 (*s*).

RULES AS TO
LIGHTS AND
SIGNALS IN
HARBOURS,
RIVERS AND
INLAND
NAVIGATIONS.

And by sect. 32 of the same act it is provided that in the case of any harbour, river, or other inland navigation for which such rules are not and cannot be made under the authority of any local act, the Queen in council may, upon application from the harbour trust or body corporate owning or exercising jurisdiction there, or from the persons interested in the navigation, make rules concerning the lights or signals to be carried, and the steps for avoiding collision to be taken, by vessels navigating such waters; and these rules, when made, are, so far as regards vessels navigating such waters, to have the same effect as if they were regulations contained in the schedule to that act (*t*).

Under local
acts.

Under Orders
in Council.

The Thames Conservancy Acts, 1857 and 1864, provide that the Conservators of the River Thames shall have power to make bye-laws for the regulation, management, and improvement of the River Thames and the navigation thereof, and to impose penalties for the breach of such bye-laws, and that all bye-laws so made shall not have any force unless and until they are allowed by her Majesty in Council (*u*).

Regulations
for the navi-
gation of the
River Thames;

In pursuance of these powers, bye-laws for the regulation of

(*r*) The dates of the earlier Orders in Council in question will be found in the Appendix, p. 48. A more recent Order in Council, dated July, 1878, has been issued in relation to the dockyard port of Portland. (Supplementary Appendix, p. 184.)

(*s*) See the 25th Article of the Regulations of 1879, *supra*, p. 605.

(*t*) See *infra*, p. 610.

(*u*) 20 & 21 Vict. c. cxlvii, s. 47; 27 & 28 Vict. c. 113, s. 31. See Appendix, p. 50.

the navigation of the River Thames have been from time to time made by the Conservators, and approved by the Queen in council, and are now in force (*w*). Such bye-laws provide, amongst other things, for the lights and fog signals to be carried or used by steamships, sailing ships and barges navigating the river (*x*); the speed at which steam vessels may proceed (*y*); the course and mode of navigation in different portions of the river (*z*), and the rules for preventing collisions to be observed by sailing vessels and steam vessels overtaking or approaching other vessels (*a*), within the jurisdiction of the Conservators.

of the Rivers
Tyne and
Tees;

Bye-laws have been made by the Tyne Improvement Commissioners and by the Conservators of the River Tees, and are now in force, providing for the lights to be carried and the speed allowed to be maintained, and the steps for avoiding collisions to be taken, by vessels navigating the Rivers Tyne and Tees respectively (*b*).

of the River
Mersey.

In pursuance of the powers given by the 32nd section of the Merchant Shipping Act, 1862 (*c*), regulations approved by an

(*w*) See Appendix, pp. 50—60, and Supplementary Appendix, pp. 184—188, where these bye-laws, together with the Orders in Council approving them, are printed. These bye-laws provide that any person infringing them shall be liable to a penalty of not exceeding 5*l*. See Order in Council of the 5th of February, 1872, Sched. Art. 72 (Appendix, p. 57); Order in Council of the 17th of March, 1875, Sched. Art. 9 (Appendix, p. 59); Order in Council of the 11th of July, 1877, Sched. Art. 7 (Appendix, p. 60); and Order in Council of the 18th of March, 1880, Sched. Art. 30 (Supplementary Appendix, p. 188.)

(*x*) See Order in Council of the 18th of March, 1880, Sched. Arts. 4—10, 12, 13, 28 (Supplementary Appendix, pp. 185, 186, 187); and Order in Council of the 17th of March, 1875, Sched. Arts. 2, 3, as to special lights for barges navigating the river. (Appendix, p. 58.)

(*y*) See Order in Council of the 18th of March, 1880, Sched. Arts. 3, 11, 14, 15 (Supplementary Appendix, pp. 185, 186). See also *The Batavier*, 1 Spks. 378; *nomine The Netherlands Steamship Co. v. Styles*, 9 Moo. P. C. C. 286.

(*z*) See Order in Council of the 5th February, 1872, Sched. Arts. 13—20

(Appendix, pp. 53, 54); Order in Council of the 17th of March, 1875, Sched. Art. 6 (Appendix, p. 58); Order in Council of the 11th of July, 1877, Sched. Arts. 2, 3, 4 (Appendix, p. 60). See also *The Margaret*, 6 P. D., C. A.; *Elmore v. Hunter*, 3 C. P. D. 116.

(*a*) See Order in Council of the 18th of March, 1880, Sched. Arts. 14—27 (Supplementary Appendix, pp. 186, 187). As to the construction of these Articles, see *The Oceano*, 3 P. D. 63.

(*b*) The bye-laws now in force relating to the River Tyne are made under the powers conferred by the River Tyne Improvement Acts, 1850, 1857, 1861, and the Harbour, Docks and Piers Clauses Act, 1847 (Supplementary Appendix, p. 141), and are dated 12th December, 1867. The River Tees Conservancy bye-laws (dated 6th September, 1870) are made under the Tees Conservancy Act (30 & 31 Vict. c. 1, ss. 46, 53, 55), and the Harbour, Docks and Piers Clauses Act, 1847 (Supplementary Appendix, p. 141).

(*c*) *Supra*, p. 609. See Supplementary Appendix, "Orders in Council," p. 198*a*.

Orders in Council under the same section are also in force in relation to the Bridgewater Navigation and the Mersey and Irwell Navigation. See

Order in Council of the 5th of January, 1881, have been made on the application of the Mersey Docks and Harbour Board, and are now in force, concerning the lights and signals to be carried, and the steps for avoiding collisions to be taken, by vessels navigating the River Mersey. These regulations provide that all vessels exceeding ten tons while navigated or anchored or moored in the River Mersey must observe and obey the above-mentioned Regulations for the prevention of collisions at sea (*d*), with certain exceptions and additions specified in the Order in Council in question, and relating to the lights to be exhibited by vessels in motion or at anchor (*e*).

We have already noticed that the precautions required by the ordinary practice of seamen must still be observed. Thus a vessel may be held to be in fault for not lowering her peak, or for not letting go her fore sheets, or for not backing her yards where by such means a collision might have been avoided (*f*). In a fog there must be sufficient force to alter the helm quickly (*g*). It is incumbent upon a vessel under way to keep a proper look-out. A hand should be stationed on the look-out at the fore part of the vessel who should not have his attention distracted by any other duty (*h*). A large vessel proceeding under steam in a crowded channel should, it seems, have more than one hand forward on the look-out (*i*). It is the duty of a vessel to proceed at no greater speed than, having regard to the circumstances in which she is being navigated, will enable her to avoid collision with other vessels (*j*).

A vessel under way, whether a steam-ship or a sailing ship, must keep clear of a vessel at anchor unless prevented by inevitable accident (*k*). A vessel at anchor or at moorings in

PRECAUTIONS
REQUIRED BY
ORDINARY
PRACTICE OF
SEAMEN.

Appendix, "Orders in Council," pp. 46, 48. As to the regulations under which the navigation of the River Danube is conducted, see Appendix, p. 48.

(*d*) *Supra*, p. 587.

(*e*) See Supplementary Appendix, p. 198a.

(*f*) *The Lady Anne*, 15 Jur. 18; *The Marpesia*, L. R., 4 P. C. 212; *The James*, Swa. 60.

(*g*) *The Europa*, 14 Jur. 627.

(*h*) *The Diana*, 1 W. Rob. 131; *The Victoria*, 6 No. of Ca. 179; *The Batavier*, *nomine The Netherlands Steam Boat Company v. Styles*, 1 Spks. 378; 9 Moo.

P. C. C. 286. See also *The Iron Duke*, 4 No. Ca. 101.

(*i*) *The Transit*, *nomine The Glanmbanta*, 1 P. D. 283. As to a look-out astern, see *The Earl Spencer*, L. R., 4 A. & E. 431; *The City of Brooklyn*, 1 P. D. 276.

(*j*) *The Perth*, 3 Hagg. 414; *The Gazelle*, 2 W. Rob. 515; *The Europa*, 14 Jur. 630; *The Great Eastern*, Br. & L. 291; *The Vivid*, Swa. 92; *The Earl Spencer*, *ubi supra*. As to the duty of vessels during a fog, see *supra*, 598.

(*k*) *The Batavier*, 2 W. Rob. 407; *The Victoria*, 3 W. Rob. 52; *The Girolamo*, 3 Hagg. 173.

harbour in threatening weather should have an anchor watch ready to tend the vessel in case of emergency. It is the duty of those in charge of a vessel at anchor to take all proper precautions against dragging, or drifting with, her anchor; and a vessel coming to anchor in the vicinity of other vessels must see that all is clear and must bring up in a safe berth (*l*).

Where a reasonable notice has been given of an intended launch it is the duty of passing vessels to avoid coming into collision with the vessel launched (*m*). A vessel in stays is almost in the predicament of a vessel at anchor, and it is the duty of a ship near her to give her room (*n*). When vessels are beating to windward in company and the leading ship puts about at the edge of a shoal, it is the duty of the following vessel to put about at the same time (*o*). Where a sailing vessel navigating near another is close-hauled, and it becomes necessary for her to pass from one tack to the other, she ought to effect the change from one tack to another by tacking and not by wearing, unless she has sufficient sea-room for the purpose of wearing, or special circumstances exist rendering the latter manœuvre the preferential one (*p*).

**LIABILITY IN
RESPECT OF
DAMAGE.**

Liability of
shipowners
and char-
terers.

The shipowners are liable for the negligent and improper acts of the master and crew whilst acting within the scope of their employment (*q*). Where a vessel is chartered the liability of the shipowner, in respect of a collision caused by the tortious or negligent acts of the crew, depends upon whether or not they

(*l*) *The Pladda*, 2 P. D. 34; *The Volcano*, 2 W. Rob. 337; *The Lochlibo*, *nomine Pollok v. M'Alpin*, 7 Moo. P. C. C. 427; *The Telegraph*, *nomine Valentine v. Cleugh*, 8 Moo. P. C. C. 167; *The Lidaskjalf*, Swa. 117; *The Northampton*, 1 Spks. 152; *The Egyptian*, *nomine Bibby v. Boissevain*, 1 Moo. P. C. C., N. S. 373; *The Princeton*, 3 P. D. 90. In the last-mentioned case it was held that where there was at least a cable's length between two vessels at anchor in the Mersey, neither of them had given the other a foul berth. Where a collision occurred in consequence of the anchors of a vessel not holding owing to their deficiency in weight, the owners of the vessel were held liable for the damage arising out of the collision; *The Massachusetts*, 1 W. Rob. 371.

(*m*) *The Blenheim*, 2 W. Rob. 421; *The Vianna*, Swa. 405; *The Glen-*

garry, 2 P. D. 235. See also *The Andalusian*, 2 P. D. 231, and the Thames Bye-Laws of the 17th of March, 1875, Art. 6 (Appendix, p. 58). And as to the River Tees, 30 & 31 Vict. c. l. s. 46.

(*n*) *The Sea Nymph*, Lush. 23; *The Leonidas*, Stuart, V.-Adm. (Canada) Reports, 229; *The St. Clair* (*nomine The Canada Shipping Company v. Wilson*), 2 App. Cases, 389. See also *The Kingston-by-Sea*, 3 W. Rob. 152.

(*o*) *The Priscilla*, L. R., 3 A. & E. 125.

(*p*) *The Falkland*, Br. & L. 207.

(*q*) See the cases cited below, and *ante*, pp. 158, 159. See also *The Iribia*, 1 W. Rob. 15; *The Columbia*, 1 C. Rob. 154; *The James Seddon*, L. R., 1 A. & E. at p. 64; *The Volant*, 1 No. of Ca. 508, 509; *The Leon*, W. N. 1881, p. 82. See as to proceedings against foreign owners under the M. S. Act, 1854, s. 527, *post*, p. 620.

can be considered to be his servants. Where the shipowner provides the vessel only, and the charterer has become *pro hac vice* owner, the latter alone is responsible for their acts (*r*). But if the shipowner provides not merely the vessel but also the crew, and the charter-party shows that, although he has parted with the possession of the ship, she is still under his control and navigated by a master and sailors appointed by him, although paid by the charterer, the owner is liable (*s*). In an early case (*t*), where an injury arose from the negligence of a crew who were paid by the owners, it was held that the latter were liable, although the ship was chartered to the Commissioners of the Navy as an armed vessel, and a commander of the Navy and a King's pilot were on board at the time of the collision. The owners of a transport employed by government are not, however, it would seem, liable for damage done by a collision which occurs in consequence of obedience to the orders of a Queen's officer under whose command she is, there being no negligence on their part (*u*).

Where it was proved that a barge which belonged to the defendant did damage, but the bargeman could not be identified,

(*r*) *Scott v. Scott*, 2 Stark. 438; *The Druid*, 1 W. Rob. 391; *The Ticonderoga*, Swa. 215; *The Lemington*, 23 W. R. 421. See also *The Ida*, Lush. 6; and *The Ruby Queen*, Lush. 266.

(*s*) *Fenton v. The Dublin Steam Packet Company*, 8 A. & E. 835. On the same principle, where the lessee of a ferry hired a steamer with a crew to ply to and fro, and a passenger, whilst on board, was injured by the breaking of a rope, through the negligence of the crew, it was held that the crew remained the servants of the shipowners, and that the latter were therefore liable to the passenger. *Dalyell v. Tyrer*, 1 E., B. & E. 899. In this case the crew were paid by the defendants. The Court abstained from saying, that because the owner was liable the charterer was not. Indeed it appears to have thought that the latter was also liable; nor is there any inconsistency in this view. The charterer may be liable if he has interfered in the navigation of the vessel, and so for the time made the crew his agents; and yet the person whose ship is injured, and who can rarely be aware of the nature of the contract between the charterer and the owner, may be entitled to resort to compensation to the latter, whose

agents the crew usually are. See the judgments in *Laugher v. Pointer*, 5 B. & C. 547; *Quarman v. Burnett*, 6 M. & W. 499; *McLaughlin v. Prior*, 4 M. & Gr. 48; and *Holmes v. Mather*, L. R., 10 Ex. 261, which were cases of collision by carriages; and *Martin v. Temperley*, 4 Q. B. 298.

(*t*) *Fletcher v. Braddick*, 2 N. R. 182. One of the terms of the charter-party in this case was, that the master should strictly observe and execute all such orders and instructions as he should from time to time receive from the officer who should be appointed to command the vessel. Lord Mansfield observed that it was doubtful whether this provision meant "that the officer should see to the navigation and direct the motions of the ship, or only direct to what place the ship should be carried for the purpose of being employed against the enemy. The true justice of the case is, that if any injury happens through the misconduct of the master and crew, the owners should be liable, but if by the misconduct of the officer, the officer should be liable. But how is a third person to ascertain the fact?"

(*u*) *Hodgkinson v. Fernie*, 2 C. B., N. S. 415; 26 L. J., C. P. 217.

it was held that this was *prima facie* evidence that the barge was steered by the defendant's servants; and that if it was on hire, or in the employment of any other person, it lay upon the defendant to prove the fact (y).

Liability of Masters.

Masters are liable both to their owners and to third persons in respect of collisions caused by their negligence or misconduct (s).

Liability where vessels in tow of steam-tugs.

Where a vessel is being towed by a steam-tug hired by her, the tug is the servant of the vessel in tow and the latter is ordinarily responsible for the conduct of the navigation, but if no orders are given to the tug, it seems that it is the duty of the tug to direct her course so as to keep the vessel towed clear of all danger (a).

It is scarcely necessary to add, that, where damage is done by a ship whilst in tow of a steamship, the owners of the ship cannot set up as a defence, that by their charter-party they were obliged to obey orders, or to put the ship in tow of the steamship (b).

Liability of officers of Queen's ships.

The superior officer of a Queen's ship is not responsible for damage caused by the act of an officer under his command, but appointed by the same authority as himself. It is a general principle, which has been acted upon on several occasions in the Court of Admiralty, that in cases of tort (c) or damage done by vessels of the Crown the legal responsibility rests with the actual wrongdoer, and the injured party must seek redress from

(y) *Joyce v. Capel*, 8 C. & P. 370.

(z) *The Volant*, 1 W. Rob. 387; 1 No. Ca. 509, and *ante*, pp. 158, 159. But where the master takes all such precautions, as a man of ordinary prudence and skill exercising reasonable foresight would use to avert danger, his owners are not responsible, because he may have omitted some possible precaution which the event suggests that he might have resorted to. *The William Lindsay*, L. R., 5 P. C. 338. See also *The Ida*, Lush. 6.

(a) *The Kingston-by-Sea*, 3 W. Rob. 153; *Stevens v. Gourley (The Cleadon)*, 14 Moore, P. C. C. 92; *S. C.*, Lush. 158; *The Arthur Gordon and The Independence*, Lush. 270; *Smith v. The St. Lawrence Tow-boat Company*, L. R., 5 P. C. 308; *The Julia*, Lush. 226, 321;

The American and Syria (nomine The Aracan), L. R., 6 P. C. 127; *The Siquasi*, 5 P. D. 241; *The Jane Bacon*, 27 W. R. 35; see also as to what is evidence of negligence in these cases, *Harris v. Anderson*, 14 C. B., N. S. 499; *The Energy*, L. R., 3 A. & E. 48.

(b) *The Tyconderoga*, Swa. 215. See also *The Mary*, 5 P. D. 14.

(c) *Nicholson v. Mounsey*, 15 East, 384. Public officers are responsible for their own acts and negligence, but are not usually liable for the misfeasance and negligence of the subordinate officers under them. The maxim *respondet superior* does not apply to these cases. See Story on Agency, sects. 319, 321, 322, and the judgment in *Hall v. Smith*, 2 Bing. 158.

the person who immediately causes the injury (*d*). The commanders of Queen's ships have, however, in cases where an appearance has been entered for them by order of the Admiralty, been condemned in causes of damage, when the collision has appeared to be the result of negligence in the management of their vessels, although there was no direct personal interference on their part (*e*).

Where a ship was sunk in the Thames by accident, without any fault of the owner, it was held, in an early case, that an indictment against him for not removing the obstruction could not be maintained (*f*). In another case an action was brought for an injury to the plaintiff's vessel by reason of its coming into collision with a barge, belonging to the defendant, which had been sunk in a navigable river. The declaration alleged that the barge was concealed by the water, and obstructed the navigation. It did not show that the barge had been sunk by any negligence of the defendant, or that, at the time of the accident, it was within his possession or control; but it alleged that it was the duty of the defendant to use proper precautions, by leaving a buoy or other signal over the sunken barge, to prevent other vessels from running against it. The Court held that no such duty could be implied from the facts (*g*).

Liability for injuries caused by obstructions in rivers.

In a later case the declaration alleged that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides, and that before the accident of which the plaintiff complained it had been removed to another part of the river, where it was not indicated, and was covered by ordinary tides, of which the defendants had notice. It then alleged that a reasonable

(*d*) See *The Mentor*, 1 Rob. 179; and the judgment in *The Athol*, 1 W. Rob. 381. The M. S. Act, 1854, s. 104, protects officers from liability in respect of the seizure or detention of any ship for supposed offences against the regulations of the statute with reference to the assumption of the character of British ships, where the seizure or detention was made upon reasonable grounds.

(*e*) See *The Volcano*, 2 W. Rob. 337; *The Birkenhead*, 3 ib. 75.

(*f*) *Rez v. Watts*, 2 Esp. 675.

(*g*) *Brown v. Mallett*, 6 C. B. 599; 12 Jurist, 204; see also *Metcalfe v.*

Hetherington, 11 Ex. 257. In the former of these cases the Court intimated, that where the owner retains possession of his sunken vessel a duty of this kind might be made to appear by proper averments; and said that in the case of *Harmond v. Pearson*, 1 Camp. 515, where Lord Ellenborough appears to have ruled that the owner of a sunken vessel was bound to place a buoy over the wreck, the declaration may have contained such averments, and that it is probable that the owner retained possession of his vessel at the time of the accident.

time had elapsed from the time of this notice to the defendants, and that they had, during this time, the means and power of properly fixing the anchor, and of indicating its situation, but that they neglected to do so, whereby the plaintiff's vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of the anchor and was damaged. It was held that the declaration was bad on demurrer, for, although it alleged that the anchor was the property of the defendants, it did not show that they were privy to its removal, or that there was any duty on them to refix it or to indicate its position (*h*).

Where, however, a declaration alleged that a vessel had been sunk in a navigable part of the Bristol Channel, and that whilst so sunk the defendant purchased her, and *had the possession, control, and management* of her, and allowed her to remain under water without buoy or notice, so that the plaintiff's vessel struck on her and was injured, it was held that the declaration showed a good cause of action; since it sufficiently appeared that the defendant had it in his power, by due care and exertion, to have removed the sunken vessel or shifted her position, and thus might have prevented the injury (*i*).

Where a person erects on the shore of a navigable river, between high and low water-mark, a work for the more convenient use of his adjoining wharf, which work (either from its original construction, or from want of repair) presents a dangerous hidden obstruction to the navigation, he is responsible for an injury thereby occasioned to a barge coming to the wharf, there being no negligence on the part of the persons in charge of the barge (*k*).

A liability, wider than the ordinary common law liability, exists in the case of the owners of a navigation, or others upon whom a special duty is cast by law. Thus, the proprietors of a canal, which is open to the public on payment of tolls, are liable for the damages caused by a collision with a sunken vessel in the canal, if they could have removed the obstruction, or have warned vessels against it by a light or signal; for the common law imposes a duty on the proprietors, not perhaps to

(*h*) *Hancock v. The York, Newcastle, and Berwick Railway Company*, 10 C. B. 348. See also *Joliffe v. The Wallasey Local Board*, L. R., 9 C. P. 62; and *White v. Phillips*, 15 C. B., N. S. 246;

33 L. J., C. P. 33.

(*i*) *White v. Criesp*, 10 Ex. 312; 23 L. J., Ex. 317.

(*k*) *White v. Phillips*, *ubi supra*.

repair the canal, or absolutely to free it from obstruction, but to take reasonable care, so long as they keep it open for public use, that those who use it may be able to do so without danger to their lives or property (*l*). The same rule has been laid down with reference to public docks and basins, the proprietors of which receive tolls from ships using them (*m*).

A private individual cannot, of his own authority, abate a public nuisance in a navigable river, or other public highway, unless it does him a special injury; he can only interfere with it as far as is necessary to exercise his right of passing along the highway (*n*). The owner of land on the banks of a navigable river has no right to erect on the bed of a navigable river any structure, whether an actual obstruction to the river will or will not be thereby occasioned; and in a Court of Equity, before the Judicature Acts, the continuance of such an erection would have been restrained by injunction at the suit of any public body empowered to remove the obstruction (*o*).

Where loss of life or personal injury has been occasioned by a collision the legal personal representatives of the deceased person or the person injured may, after notice to the Board of

Liability where loss of life or personal injury.

(*l*) *Parnaby v. The Lancashire Canal Company*, 11 A. & E. 223. See also *The Parrett Navigation Company v. Robins*, 10 M. & W. 593. But it may be a good defence, that the body on whom the duty would otherwise be cast, has no funds to remove the obstruction. *Campbell v. Hornsby*, L. R. Irish, 6 C. L. 37; 7 C. L. 82, 542. See *Wilson v. The Newport Dock Co.*, L. R., 1 Ex. 177; *Grant v. The Sligo Harbour Commissioners*, L. R. Irish, 11 C. L. 340; and *Winch v. The Conservators of the River Thames*, L. R., 9 C. P. 378.

(*m*) *Gibbs v. The Trustees of the Liverpool Dock Company*, 3 H. & N. 184; *The Mersey Docks and Harbour Board v. Penhallow*, 7 H. & N. 329; *Thompson v. The North Eastern Railway Company*, 2 B. & S. 106; *S. C.*, in Cam. Soc., *ib.* 119; 31 L. J., Q. B. 194. See, however, as to the non-liability of unpaid trustees of an ancient navigable river, *Forbes v. Lee Conservancy Board*, 4 Ex. Div. 116. In *Metcalfe v. Hetherington*, 5 H. & N. 719, a somewhat narrower view was taken of the liability of harbour trustees. In this case a harbour-master, without the knowledge of the trustees, directed that a ship should be placed

in a particular berth where an obstruction existed which injured the ship. The trustees had had notice of the obstruction, as well as the harbour-master, and had directed that it should be removed. A portion of it only had been removed, but at the time when the ship was placed in the berth in question, neither the harbour-master nor the trustees knew that it continued unsafe. Under these circumstances it was held, in the Exchequer Chamber, that there was no evidence of negligence on the part of the trustees. As to the statutory powers of harbour and conservancy authorities and of the general lighthouse authorities to remove wrecked vessels within their jurisdiction, see, *post*, Chap. SALVAGE.

(*n*) *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *The Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Peile*, 15 Q. B. 276. And see *Dobson v. Blackmore*, 9 Q. B. 991.

(*o*) *The Attorney-General v. Terry*, L. R., 9 Ch. 423. See also *Marshall v. The Ulsterwater Steam Navigation Company*, L. R., 7 Q. B. 166; 32 L. J., Q. B. 139.

Trade under the 512th section of the Merchant Shipping Act, 1854, and the refusal of the Board to institute an inquiry before the sheriff under the 507th section of that act, or the completion of such inquiry (*p*), recover compensation in respect of the loss of life or personal injury (*q*).

Effect of compulsory pilotage.

When a collision takes place within a district in which vessels are bound to be provided with a licensed pilot, the master and owners are not liable for the acts of the pilot. The effect of the existing acts on the liability of owners, masters and pilots has been considered in an earlier Chapter (*r*).

Liability for damage caused to harbours, piers or docks.

In relation to the piers, harbours and docks to which the General Harbours, Docks and Piers Act, 1847, has been made applicable, it is provided by the 47th section of that act that the owner of every vessel or float of timber shall be answerable to the undertakers of the harbour, dock or pier for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith, and that the master or person in charge of such vessel or float through whose wilful act or negligence any such damage is done shall be also liable. The section also provides that the undertakers may detain any such vessel or float of timber until security is given; and further contains a proviso exempting the owner from liability for the acts or default of a pilot employed by compulsion of law. Where damage was done to a pier, to which the section was applicable, by a vessel being driven against it in a storm, and at the time when the damage was done no person was on board the vessel which had been justifiably deserted by her master and crew, it was held that the owners were not liable for the damage done (*s*).

REMEDIES FOR DAMAGE

It remains to consider the remedies for damage by collision.

(*p*) See the M. S. Act, 1854, ss. 507—512, and *supra*, p. 83; and as to what is to be deemed a refusal, the M. S. Act, 1854, s. 512. As to the jurisdiction of the Admiralty Division under Lord Campbell's Act, see *post*, p. 624.

(*q*) See 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 96, s. 2.

(*r*) See *supra*, pp. 282—287. As to the non-liability of the owners where the master is compelled by law to obey

the orders of a dock-master, and damage is occasioned by carrying out such orders, see *The Cynthia*, 2 P. D. 52, and *supra*, p. 582, note (*d*).

(*s*) *The River Wear Commissioners v. Adamson*, 2 App. Cas. 743. See, as to a defence that the pier damaged was an illegal obstruction, *Dimes v. Pease*, 15 Q. B. 276. As to the liability of persons wilfully or negligently running foul of light vessels or buoys, see the M. S. Act, 1854, s. 414.

By the general maritime law there attaches upon a wrongdoing vessel and her freight a maritime lien to the full extent of the damage done. But this lien, although it can only be enforced by an action in a Court having Admiralty jurisdiction, yet, if it is enforced with reasonable diligence, as soon as the claim has been established, relates back to the period of the collision; and has been held to travel with the ship into whosoever possession she may come (t). Thus where, after a collision and before the arrest of the ship, she was sold to a *bonâ fide* purchaser without notice, it was held that, on the ship being pronounced to blame, a maritime lien attached which related back to the time of the collision, and overrode the intermediate rights of the vendee (u).

CAUSED BY
COLLISION.

Maritime
Lien.

Proceedings to enforce this lien may be instituted in the Admiralty Division in the form of action, commonly called an action *in rem* (x). In this form of action the ship (y), and if necessary the freight (z), may be arrested within the jurisdiction, and be detained under arrest unless bail is given to answer the claim (a). If the plaintiff fails in his action, he will not be con-

Remedy by
action *in rem*.
in Admiralty
Division.

(t) *The Europa*, Br. & L. 89; *The Charles Amelia*, L. R., 2 A. & E. 330; *The Duchesse de Brabant*, Swa. 264; see also *The Nymph*, Swa. 86. This lien takes priority of the lien of a bottomry bondholder or salvor prior in date to the damage. *The Aline*, 1 W. Rob. 111; *The Benares*, 14 Jurist, 581; 7 No. of Cases, Supp. 1. It takes precedence of the lien for wages earned before the collision. *The Linda Fler*, Swa. 309. As to the priority of claimants in actions of damage *inter se*, see *The Saracen*, *nomine Bernard v. Hyne*, 6 Moo. P. C. C. 56.

(u) *The Bold Buccleugh*, 3 W. Rob. 220; 7 Moo., P. C. C. 281; *The Parlement Belge*, 5 P. D. 197. The lien extends to subsequent accretions in the value of the ship arising from repairs, although it will not prevail against the lien of one who has, for the purpose of the repairs, advanced money on bottomry. *The Aline*, 1 W. Rob. 111.

(x) See *supra*, p. 85. See also *The Friends*, *nomine The General Steam Navigation Company v. Tonkin*, 4 Moo. P. C. C. 322.

(y) *The Dundee*, 1 Hagg. 124; *The Alexander*, 1 Dodson, 282. The judgment of Dr. Lushington in *The Volant*,

1 W. Rob. 387; 1 No. Cas. 509. The cargo which is on board a vessel at the time of a collision is not liable, in the Admiralty Court, in respect of the damage done by her. *The Victor*, Lush. 72.

(z) *The Leo*, Lush. 444; *The Flora*, L. R., 1 A. & E. 45; *The Roccliff*, L. R., 2 A. & E. 363. See also *The Orpheus*, L. R., 3 A. & E. 308, 312.

(a) See Rules of the Supreme Court, Ord. V. r. 11a. In this form of action the plaintiff's claim is limited to the value of the property, although there seems to be no reason why if the plaintiff is not fully satisfied by proceedings *in rem*, he should not resort to an action *in personam* to recover the residue. *The Orient*, L. R., 3 P. C. 696. Where, in an action at law for a collision, it appeared on the pleadings that a judgment *in rem* had been previously obtained in the Admiralty Court by the plaintiffs at law for the same cause of action, under which the ship had been sold, but the amount of the damage actually done exceeded the amount paid over to them under the Admiralty proceedings, it was held that these proceedings could not be set up in bar to the action. *Nelson v. Crouch*, 15 C. B., N. S. 99; 33 L. J., C. P.

demned in damages for the arrest unless there was *mala fides* or such negligence in the arrest as to imply malice (*b*).

Remedy by
action *in per-*
sonam.

The plaintiff may, if he pleases, sue the owners or master in the Queen's Bench Division or Admiralty Division for damages in the ordinary form of action, often called, by way of contrast to an action *in rem*, an action *in personam* (*c*).

Power to
arrest foreign
ships under
Merchant
Shipping
Act, 1854.

If the plaintiff sues *in personam*, he does not obtain the ship as a security pending the proceedings, unless he is a British subject, and the ship proceeded against is a foreign ship, and he is able to put in force the 527th, 528th, and 529th sections of the Merchant Shipping Act, 1854. The first of these sections provides that whenever any injury has, in any part of the world, been caused to any property belonging to the Queen or any of her subjects by any foreign ship, if at any time thereafter the ship is found in any port or river of the United Kingdom, or within three miles of the coast, the judge of any Court of Record in the United Kingdom, or the judge of the High Court of Admiralty, or in Scotland of the Court of Session, or the sheriff of the county within whose jurisdiction the ship may be, may, upon its being shown to him by any person applying summarily that the injury was probably caused by the misconduct or want of skill of the master or mariners of the foreign ship, issue an order directed to any officer of customs or other officer, requiring him to detain the ship until the owner, master, or consignee has made satisfaction in respect of the injury, or has given security, to be approved by the judge, to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of it, and to pay all costs and damages that may be awarded; and any officer of customs or

48. A verdict obtained by the same parties in a Court of common law was held not to be a bar to proceedings in the Court of Admiralty in respect of the same collision. *The Anne and Mary*, 2 W. Rob. 189. See also *The Bengal*, 5 Jur., N. S. 1085; Swa. 468; *The Clarence*, 1 Spks. 206. The Court of Admiralty would not, however, as a general rule, allow a person to sue in that Court in respect of a collision where he had brought an action at common law, which was still pending, in respect of precisely the same claim; it was otherwise where, owing to the insolvency of the defendant in the action, no fruit could be obtained from it.

The John and Mary, Swa. 471.

(*b*) *The Evangelismos* (nomine *Xenos v. Aldersley*), 12 Moo. P. C. C. 352; Swa. 378; *The Strathnaver*, 1 App. Cas. 58.

(*c*) *The Thames*, 5 Rob. 345; *The Volant*, 1 W. Rob. 387; 1 No. Cas. 509; *Ogle v. Barnes*, 8 T. R. 188; *Huggett v. Montgomery*, 2 N. R. 446; *Sharrod v. The London and North Western Railway*, 4 Ex. 580. It was held, that before the Judicature Acts the Admiralty Court had no jurisdiction to entertain a cause of damage against a pilot by whose negligence a collision had been occasioned. *The Alexandra*, L. R., 3 A. & E. 574.

other officer to whom such an order is directed must detain the ship accordingly (*d*).

By sect. 528, where it appears that before any application can be made under the above section the foreign ship will have departed beyond the limits mentioned in it, any commissioned officer on full pay in the military or naval service of the Queen, or any British officer of customs, or any British consular officer, may detain the ship until such time as will allow the application to be made and the result of it to be communicated to him. The officer is not liable for any costs or damages in respect of this detention, unless it is proved to have been made without reasonable grounds.

By sect. 529, in any action, suit, or other proceeding in relation to injuries of this kind, the person giving security is to be made defendant, and must be stated to be the owner of the ship that has occasioned the damage; and the production of the order of the judge made in relation to the security is conclusive evidence of the liability of the defendant to such action (*e*).

The original jurisdiction of the Admiralty Court extended over the whole subject-matter of damages on the high seas (*f*). This jurisdiction has been extended by recent statutes presently

JURISDICTION
OF ADMIRALTY
DIVISION.

(*d*) The 1 & 2 Geo. 4, c. 75, s. 33, first gave a power of this description. The Court, acting under this provision, is enabled not merely to arrest the foreign ship, but also to adjudicate upon the whole question. See *The Christiana*, 2 Hagg. 183, which is a decision upon the narrower words of the 1 & 2 Geo. 4, c. 75.

(*e*) As to the mode of procedure where a ship is detained under this section in the Admiralty Division, see *The Bilbao*, Lush. 149. The 34th section of the M. S. Act, 1876, provides, that where, under the M. S. Acts, 1854 to 1876, or any of them, a ship is authorized or ordered to be detained, any commissioned officer on full pay in the naval or military service of her Majesty, or any officer of the Board of Trade or Customs, or any British consular officer, may detain the ship; and if the ship after such detention, or after service on the master of any notice of or order for such detention, proceeds to sea before it is released by competent authority, the master of the ship, and also the owner, and any person who sends the ship to sea, if such owner or person be party or privy to

the offence, shall forfeit and pay to her Majesty a penalty not exceeding 100*l*. The section further provides, that where a ship so being sent to sea takes to sea when on board thereof in the execution of his duty any officer authorized to detain the ship, the owner and master shall each be liable to pay all expenses, and also a penalty not exceeding 100*l*., or if the offence be not prosecuted summarily, not exceeding 10*l*. for every day until the officer is able to return to the port from which he is taken.

(*f*) For an account of the inherent jurisdiction of the Admiralty Court, see the judgment of Story, J., in *De Lovio v. Boit*, 2 Gallison (American), 398. See also *The Hercules*, 2 Dods. 371; *Reg. v. Anderson*, L. R., 1 C. C. R. 169; *The Volant*, 1 No. of Ca. 508, 509. As to the disinclination of the Court to exercise jurisdiction over cases of collision occurring in foreign rivers, except in Turkish waters, see *The Ida*, Lush. 6; see also *The Druid*, 1 W. R. 391. The Court of Admiralty has concurrent jurisdiction with the Courts of Vice-Admiralty in questions of collision. *The Peerless*, Lush. 30.

to be mentioned, and the jurisdiction so extended is now possessed by the Admiralty Division; but if the cause of action has arisen out of the territorial jurisdiction of the Court, the powers of the Admiralty Division can only be exercised in cases where the property or persons proceeded against are within the jurisdiction (*g*).

Where
damage
done to
foreign
vessels.

The Admiralty Division has jurisdiction to entertain suits arising out of collisions between vessels, notwithstanding that either or both of the vessels are the property of subjects of a foreign state (*h*); but a foreign sovereign authority cannot be impleaded in any of the Courts of this country; and a public vessel of a foreign sovereign state, even if unarmed and partially engaged in trading, is, if she is substantially in use for national purposes, free from all liability of arrest in an action *in rem* (*i*).

Where colli-
sion within
a county.

The Admiralty Court had, until recently, no jurisdiction where the collision happened within the body of a county, the remedy in such a case being only in the Courts of common law (*j*). By the 3 & 4 Vict. c. 65, s. 6, however, jurisdiction was given to the Court of Admiralty to decide all claims or demands in the nature of damage received by any ship or sea-going vessel, whether she was within the body of a county or upon the high seas at the time when the damage was received (*k*). And by the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 7, jurisdiction is given to the Court of Admiralty over any claim for damage done by any ship (*l*). The jurisdiction conferred by this last

Jurisdiction
under 24 Vict.
c. 10, s. 7.

(*g*) *In re Smith*, 1 P. D. 300; *The Virar*, 2 P. D. 29. See *Harris v. The Owners of The Franconia*, 2 C. P. D. 173.

(*h*) *The Johann Frederick*, 1 W. Rob. 35; *The M. Mozham*, 1 P. D. 43, 107; *The Peerless*, Lush. 30; *The Charkieh*, L. R., 4 A. & E. 59, where the vessel arrested was the property of a semi-sovereign prince; *The Lovebird*, 6 P. D. See also *The Leon*, W. N. 1881, p. 82; *The Mali Iro*, L. R., 2 A. & E. 356, and *supra*, p. 245. The power given under the M. S. Act, 1854, to the Court of Admiralty and other courts to arrest foreign vessels in certain cases is noticed *supra*, p. 620.

(*i*) *The Parlement Belge*, 5 P. D. 197; *The Constitution*, 4 P. D. 39. Cases of collision between British ships and foreign national ships have on some occasions been referred by consent to the decision of the judge of

the Court of Admiralty. See *The Prinz Frederick*, 2 Dod. 451.

(*j*) 13 Rich. 2, st. 1, c. 5; 15 Rich. 2, c. 3; *Violet v. Blague*, Cro. Jac. 514; *S. C.*, Moo. 891; *Veltusen v. Ormsley*, 3 T. R. 315; *The Public Opinion*, 2 Hagg. 398; *The Eliza Jane*, 3 Hagg. 335. See also the cases collected in Pritchard's Adm. Digest, 282.

(*k*) Appendix, p. ccciii, note (*c*). This section applies where damage is done to a ship by a barge. *The Sarah*, Lush. 549; *Purkis v. Flower*, L. R., 9 Q. B. 114. By the 3 & 4 Vict. c. 65, s. 4, jurisdiction is conferred on the Court to decide all questions of the title to or ownership of any vessel or the proceeds thereof arising in any cause of damage before it (see Appendix, p. ccciii).

(*l*) Appendix, p. ccciii. The words "damage done" refer to damage done by a collision, and do not include a

section may be exercised either *in rem* or *in personam*, and is not confined to cases where damage (*m*) has been done by one ship or vessel to another ship or vessel. Thus, it has been held that under its provisions, damages could be recovered in the Court of Admiralty for damage done by ships to piers or breakwaters on the coasts of the United Kingdom (*n*), and that that Court had jurisdiction to entertain a cause of damage instituted by the owners of a submarine telegraph cable to recover for damage sustained by the cable in consequence of the cable having been caught by the anchor of the ship proceeded against, and negligently out by the master and crew (*o*). Where a diver, whilst employed in diving in a navigable river within the body of a county, was injured by the paddle-wheel of a steamship, and instituted a cause of damage against the steamship in the Court of Admiralty for the recovery of damages in respect of the personal injuries he had sustained, it was decided that the section gave the Court jurisdiction (*p*).

In cases of personal injuries.

A cause of action may exist under the section, notwithstanding that the plaintiff's vessel has not actually come into contact with the wrong-doing vessel. Thus, where a ship, owing to the improper navigation of a steam-tug which was towing her, was

Where damage caused by wrong-doing vessel without contact.

claim by a ship against her tug for negligence, whereby the vessel is got aground; *The Robert Pow*, Br. & L. 99. The section has been held to apply to a case of damage done by a sea-going vessel to a barge within the body of a county. *The Malcina*, Lush. 493; *S. C.*, on appeal, Br. & L. 57. As to whether the section applies to the case of a collision between two barges propelled by oars in the body of a county, see the definition of "ship" in 24 Vict. c. 10, s. 2 (Appendix, p. ccxiv), and *Everard v. Kendall*, L. R., 5 C. P. 428, which case was decided on the County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), s. 4 (Appendix, p. ccvii). The section applies to a collision between English ships in a canal in Holland (*The Diana*, Lush. 539), and to a collision between foreign ships in foreign waters. *The Courier*, Lush. 541; *Williams and Bruce Admiralty Jurisdiction*, p. 63.

(*m*) 24 Vict. c. 10, s. 35 (Appendix, p. ccxiv).

(*n*) *The Uhla*, L. R., 2 A. & E. 24 (n.); *The Excelsior*, L. R., 2 A. & E. 268; *The Industrie*, L. R., 3 A. & E. 303. As to cases where the suit

is brought for damage done to a pier, &c., to which the provisions of the Harbour Dock and Pier Clauses Act, 1847 (10 & 11 Vict. c. 27), are applicable, and the collision is alleged to have been occasioned by inevitable accident, see *Adamson v. The River Wear Commissioners*, 2 App. Cases, 743; and *supra*, pp. 618, 619. It has been doubted by the Court of Appeal, whether the Admiralty Division has under this section jurisdiction to entertain a suit for damage done to a pier in the territorial waters of a foreign state. See *The M. Mozham*, 1 P. D. 43, 107. Where no objection was taken to the jurisdiction in such a case, it was held that the liability of the shipowner was governed by the law of the foreign state. *Id.*

(*o*) *The Clara Killam*, L. R., 3 A. & E. 161. See also *The Submarine Telegraph Company v. Dickson*, 33 L. J., C. P. 139; and *The Czar*, 19 Lower Canada Jurist, 197.

(*p*) *The Sylph*, L. R., 2 A. & E. 24; and see the judgment of the Judicial Committee of the Privy Council in *The Beta*, L. R., 2 P. C. 447.

brought into collision with another ship and damaged, it was held that the owner of the damaged ship could sue the tug in the Admiralty Court (g). So also, where, by the careless navigation of those in charge of the ship proceeded against, the plaintiff's vessel was compelled to place herself in such a position that she received damage in the one case from contact with a sea wall, and in the other from a collision with a third ship, it was held that the suit had been properly brought in the Court of Admiralty (r).

In cases of
loss of life.

It was also decided in the Court of Admiralty that, in cases where loss of life or personal injuries resulting in death had been occasioned by a collision between two ships, that Court had jurisdiction to entertain suits instituted under Lord Campbell's Act by the legal personal representatives of the deceased person against the wrong-doing vessel (s). The Court of Queen's Bench, however, prohibited the Admiralty from exercising this jurisdiction. Since the passing of the Judicature Act, the Admiralty Division has asserted this jurisdiction, and the Court of Appeal, in a case where the judges were equally divided, has affirmed the jurisdiction of the Admiralty Division (t).

Jurisdiction
to enforce
judgments of
foreign
Admiralty
Courts.

Where a vessel has been in collision on the high seas, and has been, in proceedings in the nature of a suit *in rem*, condemned by a foreign Court of Admiralty in the damages sustained in the collision, but the sentence has not been satisfied, the Admiralty Division has jurisdiction to execute the sentence on the wrong-doing vessel being arrested within the territorial jurisdiction of the Court (u).

JURISDICTION
OF THE
CINQUE PORTS.

The Admiralty Court of the Cinque Ports has concurrent jurisdiction with the Admiralty Division in such cases of col-

(g) *The Nightcatch*, Lush. 342; *The Energy*, L. R., 3 A. & E. 48; and see *The Batavier*, 1 Spk. 378, for a case where, after the passing of the 3 & 4 Vict. c. 65, the owners of a barge which had been sunk in the swell of a steamship recovered against the steamship the damages they had sustained.

(r) *The Industrie*, L. R., 3 A. & E. 303; *The Sisters*, 1 P. D. 117.

(s) *The Beta*, L. R., 2 P. C. 447; *The Guildfaze*, L. R., 2 A. & E. 325; *The George and Richard*, L. R., 3 A. & E. 466,

where leave was reserved for a claim to be preferred on behalf of a child *en ventre sa mère* at the time of the collision, if born within due time. See also *The Explorer*, L. R., 3 A. & E. 289; 2 P. D. 164, note; and *Smith v. Brown*, L. R., 6 Q. B. 729.

(t) See *The Franconia*, 2 P. D. 163.

(u) *The City of Mecca*, 5 P. D. 28. And see the decision of the Court of Appeal in the same case, W. N. 1881, p. 75.

lision occurring within the boundaries of the Cinque Ports as could have been entertained in the High Court of Admiralty before the recent statutes extending the jurisdiction of that Court (*v*).

It is provided by the third section of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), that the county courts having Admiralty jurisdiction (*x*) shall have jurisdiction over claims for damage by collision where the amount claimed does not exceed 300*l.*, or where the amount claimed is beyond that limit, if the parties agree, by a signed memorandum, that any county court having Admiralty jurisdiction and specified in such memorandum shall have jurisdiction (*y*). The 4th section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, extends and applies the provisions of this section to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l.* (*z*). Under this section county courts having Admiralty jurisdiction can entertain a claim for damage done to a ship by a barge within the body of a county (*a*); but the provisions of the section do not confer on these Courts jurisdiction either in an action against a pilot who, when in charge of a vessel, has brought about a collision (*b*), or in a case where a collision has occurred within the body of a county, between two barges propelled by oars only (*c*).

JURISDICTION
OF COUNTY
COURTS
HAVING
ADMIRALTY
JURISDICTION.

The Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24), JURISDICTION
OF VICE-

(*v*) See *The Vivid*, 42 L. J., Adm. 57; and *infra*, CHAP. X. SALVAGE. See also the 33rd section of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71, Appendix, p. ccvii), allowing appeals and transfers to be made to the Court of Admiralty of the Cinque Ports in lieu of the High Court of Admiralty in all cases which arise within the jurisdiction of the Cinque Ports as defined by 1 & 2 Geo. 4, c. 76, s. 18 (see Supplementary Appendix, p. 130), and are also within the jurisdiction of a County Court having Admiralty jurisdiction.

(*z*) See Appendix, p. ccxcviii. For a list of these Courts and the limits of their jurisdiction, see Appendix, Orders in Council, pp. 20–25. Actions instituted under this section can be transferred to the Admiralty Division either by order of that Division or

of the County Court in which the suit is pending. See sects. 6, 7, 8.

(*y*) The 9th section of the Act provided how the costs of the proceedings were to be borne in cases where claims below the limited amount were brought in the Superior Court, but this provision has become inoperative since the passing of the Judicature Act. See Rules of the Supreme Court, Order LV. r. 1. *Garnett v. Bradley*, 3 App. Cas. 944; and *Tenant v. Ellis*, 6 Q. B. D. 46.

(*x*) Appendix, p. ccviii.

(*a*) *Purkis v. Flower*, L. R., 9 Q. B. 114.

(*b*) *The Alexandria*, L. R., 3 A. & E. 574; *Flower v. Bradley*, 44 L. J., Ex. 1.

(*c*) *Everard v. Kendall*, L. R., 5 C. P. 428.

ADMIRALTY
COURTS AND
OTHER COURTS
OF ADMI-
RALTY JURIS-
DICTION.

sect. 10, gives jurisdiction to the Vice-Admiralty Courts over claims "for damage done by any ship" (c).

The Court of Admiralty in Ireland has inherent jurisdiction in causes of damage, and this jurisdiction has recently been extended by statute (d). In Scotland, the Court of Session has an Admiralty jurisdiction in cases of collision between ships (e).

Jurisdiction
of justices
in cases of
damage to
piers, &c.

The 75th section of the Harbours, Docks and Piers Clauses Act, 1847, provides that any damage done to the harbours, piers, docks or works within that Act, by any vessel or float of timber, shall, if the amount claimed in respect of such damages does not exceed 50*l.*, be recoverable in England or Ireland before two justices, or in Scotland before the sheriff of the county, and that in any such case where damages have been awarded the justices or sheriff may detain and keep the vessel or float by which such damage has been done until payment of the amount of damages awarded and costs (f).

By the 76th section of the same Act, it is provided that where any owner of a vessel or float of timber has made satisfaction for any such damages as in the preceding section mentioned, wilfully or negligently done by the master or person in charge of such vessel or float of timber, the amount of such damage, if it does not exceed 50*l.*, shall be recoverable from the person who actually did the damage before two or more justices or the sheriff in Scotland (g).

PROCEDURE IN
ADMIRALTY
DIVISION AND
QUEEN'S
BENCH
DIVISION.

There was formerly a very marked difference between the mode of proceeding in the Admiralty Court and in the Common Law Courts, but since the passing of the Judicature Acts many of these distinctions have ceased to exist (h).

(c) See Appendix, p. cexl, and *supra*, p. 123, n. (x). See also the Vice-Admiralty Courts Act Amendment Act, 1867, 30 & 31 Vict. c. 45; Appendix, p. cclxxii. This section confers jurisdiction over a claim for damage done by a ship to a wharf. *The Chase*, Stuart's Vice-Adm. (Quebec) Reports, 1875, p. 361; *S. C.* on appeal, P. C., July 22nd, 1873.

(d) See 30 & 31 Vict. c. 114, s. 29. As to the admiralty jurisdiction of certain local Courts in Ireland, see 39 & 40 Vict. c. 28, and 40 & 41 Vict. c. 56, s. 49.

(e) See 11 Geo. 4 & 1 Will. 4, c. 69, ss. 21, 22, and Fraser's Judicial Proceedings before the High Court of

Admiralty in Scotland (Edinburgh), 1814.

(f) 10 Vict. c. 27; Supplementary Appendix, p. 148. If payment be not made within seven days of the award, the vessel or float may be sold, and the damages, costs, and expenses paid out of the proceeds.

(g) Supplementary Appendix, p. 148.

(h) The practice of the Court of Admiralty is in force in the Admiralty Division so far as it has not been expressly varied either by the Judicature Acts or the Rules of the Supreme Court (38 & 39 Vict. c. 77, s. 18). See *The Vivar*, 2 P. D. 29; *The Polymedo*, 1 P. D. 121; *The Sfactoria*, 2 P. D. 3; *The*

The distinction between proceedings *in rem*, which can only be instituted in the Admiralty Division, and proceedings *in personam*, has already been noticed (i).

In the Admiralty Division the trial invariably takes place before the judge without a jury, but usually assisted by elder brethren of the Trinity House of Deptford Strond (j), who act as skilled nautical assessors (k); while in the Queen's Bench Division the trial usually takes place before a judge and jury (l).

Mode of trial.

Until within recent times the Court of Admiralty received evidence by written depositions only, but by the 3 & 4 Vict. c. 65, the practice was introduced into the Admiralty Court of taking evidence by word of mouth, and now evidence is taken substantially in the same manner in all divisions of the High Court (m).

The burden of proof lies in all cases upon the party seeking to recover compensation for damage caused by a collision, and he must establish that the loss was attributable to the default of the person sued (n). There are, however, certain artificial rules introduced by the legislature on the ground of public policy, which in certain cases affect the onus of proof in actions of collision.

Burden of proof.

Thus, by sect. 28 of the Merchant Shipping Act, 1862, in case

Matthew Cay, 5 P. D. 49. As to the practice of the Court of Admiralty, see Brown's Civil and Admiralty Law, vol. 2, p. 396 *et seq.*; Pritchard's Admiralty Dig. tit. Practice; Williams and Bruce's Admiralty Practice; Roscoe's Admiralty Practice. Where in a cause of collision proceedings were taken in the Admiralty Court on behalf of the crown against the ship causing the damage, it was held that the 18 & 19 Vict. c. 90, did not impose upon the crown the liability to pay costs. *The Leda*, Br. & L. 19. Where the proceedings are in the Admiralty Division and the Crown is not a plaintiff, the costs are in all cases in the discretion of the Court. Ord. LV. r. 1. As to actions against the officers of Queen's ships, see *H.M.S. Swallow*, Swa. 30.

(i) See *supra*, pp. 619, 620.

(j) See *The Æolides*, 3 Hagg. 367, and *supra*, p. 272, n. (o).

(k) In the Admiralty Division, whether Trinity Masters attend or not, the decision in every case rests with the judge alone. *The Aid*, 6 P. D. [March 5, 1881]; *The Swanland*, 2 Spks. 108; *The Alfred*, 7 N. of C. 354; *The Speed*, 2 W. Rob. 231. See also

the judgment in *The Vernon*, 1 N. of C. 280, and Williams and Bruce's Adm. Practice, p. 271, n. (e).

(l) Where a case is tried before a judge and jury, skilled witnesses, who did not see the collision, may give evidence as experts; but in the Admiralty Division, when the Trinity Brethren are present to advise the court, such evidence is not commonly received. *The No*, 1 Spks. 184; *The Earl Spencer*, L. R., 4 A. & E. 431; *The Gazelle*, 1 W. Rob. 474; *The Ann and Mary*, 2 W. Rob. 196.

(m) See sect. 7. In default actions in the Admiralty Division, it is usual for evidence to be brought before the court by affidavit. See *The Polymede*, and *The Sfactoria*, *ubi supra*.

(n) *The London*, *nomine Morgan v. Sim*, 11 Moo. P. C. C. 307; *Spaight v. Tedcastle*, 6 App. Cas. 217, 224; *The Benmore*, L. R., 4 A. & E. 132; *The Otter*, L. R., 4 A. & E. 203. As to the onus of proof where the shipowners set up the defence of compulsory pilotage, see *The Clyde Navigation Commissioners v. Barclay*, 1 App. Ca. 790, and *supra*, p. 285.

any damage to person or property arises from the non-observance by any ship of any Regulation made by or in pursuance of that act, the damage is to be deemed to have been occasioned by the wilful default (*p*) of the person in charge of the deck of the ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary (*q*).

Where regulations infringed.

Moreover, it is provided by the 17th section of the Merchant Shipping Act, 1873 (*r*), that if in any case of collision it is proved to the Court before which the case is tried that any of the Regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship (*s*) by which such Regulation has been infringed shall be deemed to be in fault (*t*), unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary (*u*).

This section applies to a case of collision where the Regulations have been infringed by a foreign vessel on the high seas (*x*). A ship will not be deemed in fault by virtue of the provisions of this section where it is proved that the infringement of the Regulations could not by any possibility have contributed to the collision (*y*). Thus, where a collision occurred between two

(*p*) The words "wilful default" in this section do not affect the liability of the shipowner for the unintentional but negligent acts of the master or crew. *Orill v. The General Screw Collier Company*, L. R., 1 C. P. 601; 3 C. P. 476; *The Seine*, Swa. 411. As to the meaning of "person in charge," see *infra*, p. 629, n. (*b*).

(*q*) See also the M. S. Act, 1854, s. 27, *supra*, p. 585, as to the statutory obligation imposed on owners and masters to obey these Regulations.

(*r*) This section is substituted for the 29th section of the M. S. Act, 1862, which section, until it was repealed by the M. S. Act, 1873, s. 33, took the place of sects. 298 and 299 of the M. S. Act, 1854 [repealed by the M. S. Act, 1862, s. 2, and Sched. table A.]. See *The Juliana*, Swa. 20, and *The Fenham*, L. R., 3 P. C. 212.

(*s*) The owner of cargo suing in an action of collision will not be "deemed in fault" under this section for the negligence of the vessel carrying the cargo. See *The Milan*, Lush. 388, a decision upon sect. 298 of the M. S. Act, 1854.

(*t*) This does not mean "shall be

deemed solely in fault." *The Hibernia*, 24 W. R. 60—P. C.; *The Lady Downshire*, 4 P. D. 26. See also *The Alival*, 18 Jurist, 296; *The James, Lawson v. Carr*, 10 Moo. P. C. C. 162; *The London, nomine Morgan v. Sim*, 11 Moo. P. C. C. 307.

(*u*) For recent cases where defences that circumstances rendered a departure from the Regulations necessary were not sustained, see *The Tyrzah*, 4 P. D. 33; *The Lovebird*, 6 P. D. [March 4, 1881]. See also *The Aurora*, Lush. 327, and *The London*, 11 Moo. P. C. C. 307.

(*x*) *The Magnet*, L. R., 4 A. & E. 417.

(*y*) *The Magnet, ubi supra*; *The Duke of Sutherland*, L. R., 4 A. & E. 419; *The Fanny M. Carvill*, L. R., 4 A. & E. 422; *S. C. on appeal*, 44 L. J., Adm. 34. See also *The Englishman*, 3 P. D. 18; *The Khedive, nomine Stoomvaart Maatschappij Nederland v. The Peninsular and Oriental Steam Navigation Co.*, 5 App. Ca. 893, 894. Those who represent the ship guilty of an infringement of the regulations have the burden cast upon them of showing that the infringement could not have possibly contributed to the collision. *The Fanny M. Carvill, ubi*

vessels, one of which carried an improper light, and it appeared that the collision was caused by the absence of a look-out on the part of the other vessel, it was held that the section did not apply (z).

It is further provided by the 16th section of the Merchant Shipping Act, 1873, that "in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers (if any) to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound; if he fails so to do and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default" (a). The same section also provides that "every master or person in charge (b) of a British vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and if he is a certificated officer an inquiry into his conduct may be held, and his certificate may be cancelled or suspended" (c).

Where vessel neglects to stand by, &c., after collision.

supra. The following are cases where it was held that this burden had not been discharged:—*The Tirzah*, 4 P. D. 33, where the lights of the vessel guilty of the infringement were not placed in accordance with the Regulations; *The Magnet*, L. R., 4 A. & E. 417, where one of the side lights of the vessel deemed in fault was inefficient, and so placed as to be obscured; *The Lady Downshire*, 4 P. D. 26, where the Regulations as to lights contained in the Mersey Sea Channels Act, 1874 (see *supra*, p. 607) were not complied with; and *The Lovebird*, 6 P. D. [March 4, 1881], where the Regulations of 1879 (see *supra*, p. 596) were infringed by the neglect to use a mechanical foghorn. See also *The Bougainville*, L. R., 5 P. C. 316.

(z) *The Englishman*, 3 P. D. 18.

(a) See, as to this provision, *The Queen of the Orwell*, 11 W. R. 499, and *The Adriatic*, 3 Asp. Mar. Law Cas. 16.

(b) As to the meaning of the words "person in charge," see *Ex parte Ferguson*, L. R., 6 Q. B. 280; see also *The Queen*, L. R., 2 A. & E. 53.

(c) The enactments in force previous to this section were the M. S. Act, 1862, s. 33, and the M. S. Act, 1871, s. 9, which were both repealed by the M. S. Act, 1873, s. 33. Of these repealed sections, the M. S. Act, 1862, s. 33, dealt only with the duty of the master to render assistance; and the M. S. Act, 1871, s. 9, for the first time declared that it was the duty of the master to furnish his vessel's name, &c. The latter section defined "vessel," as used in the section, to include "any vessel used in navigating, however propelled." This definition does not occur in the M. S. Act, 1873. As to the law before any legislation on the subject, see *The Celt*, 3 Hag. 321, and *supra*, p. 474 and p. 475, n. (z).

Entries in official log respecting collision.

In relation to the evidence usually produced in cases of collision, the following provisions must be noticed:—

The Merchant Shipping Act, 1854, provides, by sect. 328, “that in every case of collision, in which it is practicable so to do, the master must, immediately after the occurrence, cause a statement of the collision, and of the circumstances under which it occurred, to be entered in the official log-book (*d*), which entry is to be signed by the master, and also by the mate or one of the crew, subject to a penalty not exceeding 20*l*. The section further provides “that the entry so made shall be received in evidence in any proceeding in any Court of justice, subject to all just exceptions” (*e*).

RULES AS TO
AMOUNT OF
DAMAGES.

The rules which were formerly applied in cases of contributory negligence in cases of collision in Courts of common law differed widely from the rules adopted by the Admiralty Court. If, in a case of collision at common law, it appeared that the plaintiff had been guilty of negligence which substantially contributed to the collision, he could not recover, while in the Admiralty Court no such rule was recognized (*f*). It is, however, now provided by the 25th section of the Judicature Act of 1873,

(*d*) See *supra*, p. 140, and Appendix, “Forms,” No. 43.

(*e*) See *The Europa*, 13 Jurist, 856; *The Malta*, 2 Hagg. 159. It is provided by the 448th section of the M. S. Act, 1854, that any receiver of wreck or justice of the peace shall, as soon as conveniently may be, examine on oath any person belonging to any ship which may have been in distress on the coast of the United Kingdom, or any other person who can give any account thereof, as to (amongst other matters) the occasion of the distress of the ship, and make two copies of the examination, which is to be taken in writing, and send one copy thereof to the Board of Trade, and the other to the secretary of Lloyd’s. Depositions taken under these provisions, and relating to the circumstances of a collision, and entries in the ship’s log as to the circumstances in which the collision occurred, are not admissible in an action to recover damages arising from the collision, as evidence on behalf of the owners of the ship to which the person making the depositions belonged, or on board which the log was kept. *Nothard v. Pepper*, 17 C. B., N. S. 79; *The Little Lizzie*, L. R., 3 A. & E. 56; *The Henry Coxon*, 3 P. D. 166. By the Regula-

tions of the Trinity House of Deptford Strond, the pilots licensed by that corporation are required to report any collision which occurs with a vessel of which they are in charge. See as to the admission as evidence in the Admiralty Division of coastguard books, lighthouse logs, and master’s protests respectively—*The Catharina Maria*, L. R., 1 A. & E. 53; *The Maria das Dores*, Br. & L. 27; *The Osmanli*, 7 N. of C. 507; *The Emma*, 2 W. Rob. 316; *The Hedwig*, 1 Spks. 21. As to the inadmissibility in evidence of the proceedings on shipping casualty investigations or naval inquiries, see *The Mangerton*, Swa. 124; *The City of London*, *ib.* 246; *H.M.S. Swallow*, *ib.* 30.

(*f*) 36 & 37 Vict. c. 66, s. 24, subs. 9; *Thorogood v. Bryan*, 8 C. B. 113; *Catlin v. Hills*, *ib.* 123; *Armstrong v. The Lancashire and Yorkshire Rail. Co.*, L. R., 10 Ex. 47; *Spaight v. Tedcastle*, 6 App. Cas. 223; *Vanderplank v. Miller*, M. & M. 169; *Vennall v. Garner*, 1 C. & M. 21; *Lack v. Seward*, 4 C. & P. 106; *Luxford v. Large*, 5 C. & P. 421; *Sells v. Brown*, 9 C. & P. 601; *Bridge v. The Grand Junction Rail. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546. See also *Radley v. The North Western Rail. Co.*, 1 App. Cas. 751.

that "in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault the rules in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail" (g).

The Rules which were acted upon by the Court of Admiralty, and which are now applicable in all the Divisions of the High Court, are as follows:—First, if the damage happen without blame being imputable to either party,—as where the loss is occasioned by a storm or any other *vis major*,—the loss must be borne by the party on whom it happens to light; the other is not responsible to him in any degree. Secondly, if both parties are to blame,—as where there has been a want of due diligence or of skill on both sides,—the loss must be apportioned between the parties, as it has been occasioned by the fault of both. Thirdly, if the damage happen by the misconduct of the suffering party only, the sufferer must bear his own burthen; and, lastly, if it was caused by the fault of the ship which ran the other down, the injured party is entitled to an entire compensation from the other (h). The first of these rules, namely, that where the damage is the result of mere accident the loss must be borne by the party on whom it falls, has been often recognized and acted upon (i). It appears that it will be applied not only

(g) See *The Milan*, Lush. 388; *Hey v. Le Neve*, 2 Shaw, Scotch App. Cas. 395; *The Julia, nomina Bland v. Ross*, 16 Moo. P. C. C. 210. And see a pamphlet by Mr. Rothery, the present Wreck Commissioner, entitled "A Defence of the Rule of the Admiralty Court in cases of Collision between Ships" [London: Longmans, 1873], where the Admiralty Rules are explained and supported with great ability.

(h) See the judgment of Sir W. Scott in *The Woodrop Sims*, 2 Dods. 85, cited and approved of by Lord Gifford in *Hay v. Le Neve*, 2 Shaw's Scotch Appeal Cases, 401.

(i) *The Shannon*, 1 W. Rob. 463; *The Ebenczer*, 2 W. Rob. 206; *The Itinerant*, *ib.* 236; *The Thornley*, 7 Jur. 659; *The Marpesia*, L. R., 4 P. C. 212; *The William Lindsay*, L. R., 5 P. C. 338; *Nugent v. Smith*, 1 C. P. D. 423. This rule agrees with that of the Roman law (Dig. lib. 9, tit. 2, Ad Legem Aquileiam, lib. 29), the principle of which was adopted by some of the

early maritime codes of Europe. See the Consolato, cap. 155. The laws of Oléron and of Wisbuy appear to lay down a different rule, and to direct that in cases of accident the damage shall be divided equally between the injured vessels. See Article 15 of the former law, and Articles 29, 49, 50 and 65 of the latter. It is curious that Boulay Paty, in his *Cours de Droit Commercial Maritime*, tit. 12, s. 6, vol. 4, p. 493, asserts that the former of these rules was adopted by all the ancient maritime codes. The French Code de Commerce follows the civil law, and by Art. 407 directs, "Si l'événement a été purement fortuit, le dommage est supporté sans répétition par celui des navires qui l'a éprouvé." See also the observations on this subject in Valin Ordon. de la Marine, liv. 3, tit. 7, art. 10, vol. 2, p. 177; Emerigon *Traité des Assur.* c. 12, s. 14; 1 Bell Comm. 580, 581, and notes; Marshall on Ins. B. 1, c. 12, s. 2; and 3 Kent Com. 231.

where the evidence shows conclusively that the injury was occasioned by accident, but also where there is a reasonable doubt as to the preponderance of the evidence on this point (*k*). An inevitable accident has been defined to be one which could not possibly be prevented by the exercise of ordinary care, caution, or maritime skill (*l*). Under the second of these rules, when both vessels are in fault, the sums representing the damage sustained by each are added together, and the amount is equally divided between the two (*m*). This rule holds good even although one of the vessels may have been more in fault than the other (*n*). Where the Court of Session in Scotland, finding that both ships were to blame, but that a greater share of blame rested on one, decided that her owners were liable to two-thirds of the damage, the House of Lords, upon appeal, reversed the decision (*o*). It must be noticed that the rule is applied not only where each vessel has by her negligence contributed to cause the collision, but also in cases where one or both of the vessels has been deemed to be in fault for a nonobservance of the statutory regulations for preventing collisions under the provisions which are contained in the Merchant Shipping Act, 1873, and which we have above referred to (*p*). The third rule mentioned above requires no comment (*q*). With respect to the second and last of these rules, when once their application to the liability of the parties is ascertained, the following rules as to the measure of damages have to be taken into consideration.

(*k*) See the observations of Lord Stowell in *The Catharine of Dover*, 2 Hagg. 154.

(*l*) See the judgment of Dr. Lushington in *The Virgil*, 2 W. Rob. 205, and the judgment of the Judicial Committee of the Privy Council in *The Marpesia*, L. R., 4 P. C. 212, and *The William Lindsay*, L. R., 5 P. C. 338. See also *The River Wear Commissioners v. Adamson*, 2 App. Ca. 743.

(*m*) See *The Betsy Caines*, 2 Hagg. 28; *The Mellona*, 3 W. Rob. 7, 16; H. M. S. *Inflexible*, Swa. 200. The application of the rule is that each vessel is condemned in the moiety of the damages sustained by the other. *The Laconia*, Br. & L. 117; *The Meteor*, L. R. (Irish) 9 Eq. 567; and *Chapman v. The Royal Netherlands Steamship Co.*, 4 P. Div. 157 (*supra*, p. 81, n. (*l*)), where the owners of one of the two vessels had taken proceedings for the limitation of their liability under the M. S. Acts.

(*n*) *The Judith Randolph*, cited by Lord Gifford in *Hay v. Le Nere*, 2 Shaw's Scotch Appeal Cases, 403; *The Immaganda Sara Clasina, nomine Vaux v. Sheffer*, 8 Moo. P. C. C. 75; *The Linda*, 4 Jur., N. S. 147. Lord Denman, in *De Vaux v. Salvador*, 4 A. & E. 432, speaking of this rule, said, "It grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it." See also the quotations from foreign law writers, and the valuable remarks in Mr. Serjt. Shee's edition of Abbott on Ship. 523 (10th edit.). See also Marsden's *Collisions at Sea*, p. 52, as to how far the rule is at present adopted abroad.

(*o*) *Hay v. Le Nere*, 2 Shaw's Appeal Cases, 395; see also *The Washington*, 5 Jur. 1067.

(*p*) See *supra*, p. 628.

(*q*) *The Ligo*, 2 Hagg. 356, was a case falling within this rule.

The provisions of the Merchant Shipping Acts, 1854 and 1862, which limit the liability of the owners of sea-going ships in respect of injuries to life and property which occur without their actual default or privity, have already been fully mentioned in an earlier Chapter (*r*). Subject to these statutory provisions, the damages which the owner of the injured vessel is entitled to recover are estimated as in other actions of a like nature (*s*). Thus the Court may award full compensation for the damages, both direct and consequential, which have been sustained by a collision. The rule which is applied in cases of insurance, namely, that in fixing the amount to be paid by the underwriters for repairs, one-third of the cost price is to be deducted where new materials are substituted for old, does not apply in causes of damage by collision; for in these cases the claim for indemnity arises *ex delicto*, and the right against the wrongdoer is for a complete restitution (*t*); although the effect may be to make the ship of greater value than she was before the collision (*u*).

Limitation of liability.

Measure of damages.

The wrong-doing vessel will be condemned in the consequential loss arising from the abandonment of the injured vessel by her master and crew under a reasonable apprehension of danger (*x*); and where it has been necessary to have recourse to assistance in the nature of salvage, the remuneration paid for that salvage service will form part of the damages allowed (*y*).

Consequential loss.

(*r*) See *ante*, pp. 79–83. The provisions of the M. S. Act, 1854, on this subject were not applicable to foreign ships. *The Iron Screw Colliery Company v. Schurmanns*, 6 Jur., N. S. 883; 29 L. J., Ch. 877, and *The Wild Ranger*, 32 L. J., P. M. & A. 49; Lush. 553. We have already seen that the M. S. Act, 1862, s. 54, refers in terms to foreign ships, and that the provisions of this act referred to in the text are applicable to foreign ships. *The Amalia*, Br. & L. 151, and *supra*, p. 80.

(*s*) The amount of damage are in practice always assessed out of Court. In the Admiralty Division the damages are assessed by the Registrar assisted by merchants. This tribunal performs the duties imposed upon it with great ability and despatch.

(*t*) See the judgment in *The Gazelle*, 2 W. Rob. 281; *The Pactolus*, Swa. 173; *The Northumbria*, L. R., 3 A. & E. 127; the observations of Sir Robert Phillimore in *The Halley*, L. R., 2 A.

& E. 1; see also *The Star of India*, 1 P. D. 466; *The Consett*, 5 P. D. 229.

(*u*) *The Pactolus*, *ubi supra*; *The Clyde*, Swa. 23.

(*x*) *The Blenheim*, 1 Spks. 285; *The Pensher*, Swa. 211, 215; *The Linda Melcha*, Swa. 306; *The Flying Fish*, Br. & L. 436; *The Countess of Durham*, 9 Monthly Law Magazine, 279; *The Kingston-by-Sea*, 3 W. Rob. 155; *The Thuringia*, 41 L. J., Adm. 44; *The Lindsay*, L. R. (Irish), 1 Eq. 259; *The Despatch*, 14 Moo. P. C. C. 83.

(*y*) *The Blenheim*, 1 Spks. 285; *The Legatus*, Swa. 168. The costs incurred on both sides in the salvage suit will also, according to the practice of the Admiralty Division, ordinarily be allowed as a proper item of the damages; for it has always been considered by the Court of Admiralty, that where salvage services have been rendered the persons interested in the property salvaged are entitled to the decision of a competent Court, as to the

Where damage has arisen, subsequent to the collision, from the want of ordinary nautical skill and prudence on the part of those in charge of the damaged vessel, such damage will not be regarded as consequent upon the collision (s); but persons suddenly placed in a position of danger and difficulty, although they are bound to show ordinary resolution and control, cannot be expected always to adopt, in the emergency, the measures which subsequent events may prove would have been the best (a).

Loss of freight.

Where a vessel is earning freight at the time of the collision, and a claim is sustained for a total loss, compensation for the freight she would have earned had her voyage been completed is allowed, subject to necessary deductions representing the cost which would have been incurred in earning the freight. But if a vessel is totally lost by collision at a time when she is not earning freight, interest on her value will be allowed from the time of her loss (b).

Loss of charter.

So, the loss of the benefit of a charter, the performance of which has been interfered with by the collision, may be taken into account (c).

Damages for detention.

Where the damaged vessel can be repaired damages for the detention of the vessel during the time necessarily occupied by the repairs are commonly allowed in addition to the cost of the repairs (d).

Measure of damage not altered though plain-

A defendant, in an action of collision, is not entitled to deduct from the amount of the damages a sum which the plaintiff has received from an underwriter on account of the same injury ;

amount of salvage remuneration to which the salvors are entitled. *The Legatus*, Swa. 168. Where the action of collision is tried in the Queen's Bench Division, the proper question for the jury is whether, in respect to the suit for salvage, the master of the salvaged ship pursued the course which a prudent and reasonable man would have followed. *Tindall v. Bell*, 11 M. & W. 228.

(z) *The Eolides*, 3 Hagg. 367.

(a) See Williams and Bruce, Admiralty Practice, p. 83.

(b) *The Northumbria*, L. R., 3 A. & E. 12; *The Clyde*, Swa. 23; *The Iron-master*, Swa. 441; see also *The Columbus*, 2 W. Rob. 158; *The Clarence*, 3 W. Rob. 283. Where ship and freight are totally lost, the measure of freight lost is the gross freight contracted for,

less the expense which would have been incurred in carrying it. *The Canada*, Lush. 585.

(c) See the judgment of Dr. Lushington in *The Matchless*, 10 Jur. 1017; and the judgments of Sir Robert Phillimore in *The Star of India*, 1 P. D. 466; *The Conselt*, 5 P. D. 229; see also *The Betsy Caines*, 2 Hagg. 28; *The Yorkshireman*, *ib.* 30, note. As to what damages are direct see *The Sisters*, 1 P. D. 117, and *The Bailiffs of Bonney Marsh v. The Trinity House*, L. R., 5 Ex. 204; affirmed L. R., 7 Ex. 247.

(d) *The Inflexible*, Swa. 200; *The Black Prince*, Lush. 508. See also *The Star of India*, 1 P. D. 466. As to the rate of compensation for detention usually allowed in the case of steamers, see *The City of Buenos Ayres*, 1 Asp. Mar. Law Cas. 169.

for a wrong-doer cannot claim the benefit of a contract of insurance effected by the person whose property he has injured (e). tiff has recovered from underwriters.

Where proceedings in the nature of proceedings *in rem* have been instituted in a competent Court abroad to recover damages arising out of a collision, and whilst such proceedings are pending, an action *in rem* in respect of the same collision is instituted in the Admiralty Division, the plaintiff will be put to his election to abandon one or other of the two suits (f). Pendency of actions before foreign courts or courts having concurrent jurisdiction.

And in a case where it appears that at the time when proceedings were being taken in an action of damage in the Admiralty Division, cross causes of damages between the same parties were pending in the Court of Admiralty in Ireland, the Admiralty Division ordered the suit before it to be dismissed (g).

(e) *Yates v. Whyte*, 4 B. N. C. 272, which was decided on the principle laid down in *Mason v. Sainsbury*, 3 Doug. 61. On the same principle it has been decided that in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages; *Bradburn v. The Great Western Rail. Co.*, 10 L. R., Ex. 1.

(f) *The Mali Ivo*, L. R., 2 A. & E. 356; *The Delta*, 1 P. D. 404; see also *The Lanarkshire*, 2 Spks. 189. In *The Delta*, 1 P. D. 404, the defendant in an action of damage *in rem* pleaded that the plaintiff had been condemned in the damages arising out of the same collision by the judgment of a foreign court pronounced in an action *in rem*. The judgment of the foreign court was a judgment by default, and, in the particular circumstances, the Admiralty Division refused to recognize the foreign judgment as having any binding effect. Where a point was raised as to whether the pendency of proceedings in the Court of Session in Scotland to recover damages in respect of the same collision could be set up as *lis alibi pendens* in answer to the

claim in the English Court of Admiralty, it was held by the Privy Council, that since the two suits were in their nature different, the one being *in personam*, and the other *in rem*, the pendency of the former could not be pleaded in suspension of the latter. *The Bold Buccleugh*, 7 Moo. P. C. C. 207; 3 W. Rob. 220. See also *The Bengal*, 5 Jur., N. S. 1086; Swa. 468; and *Castrique v. Imrie*, 8 C. B., N. S. 1; S. C., in Cam. Scacc., *id.* 406; in Dom. Proc., L. R., 4 H. L. 414. See, as to pleas that the defendant's ship was French, and that a French Court of law had decided the question, *The General Steam Navigation Company v. Gillou*, 11 M. & W. 877. In *Harris v. Willis*, 15 C. B. 710, it was held, in an action of collision, that a plea alleging that the merits of the case had already been determined by the Admiralty Court in favour of the defendant in proceedings taken in that Court, afforded no answer to the action, the plea not showing on the face of it that the Admiralty Court had jurisdiction over the matter.

(g) *The Catterina Chiazare*, 1 P. D. 368.

CHAPTER X.

SALVAGE, TOWAGE, WRECK AND SHIPPING CASUALTIES.

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SALVAGE is the compensation allowed to persons by whose exertions a ship or boat, or the cargo of a ship, or the lives of persons belonging to her, are saved from danger or loss, in cases of shipwreck, derelict, capture, or the like (a). The right to remuneration in these cases rests obviously upon equitable grounds; it was recognized by the Roman law, and has been upheld by the different maritime Courts of Europe (b). The subject of salvage has been frequently dealt with by the Legislature of this country. The chief statutory provisions now in force in this country with reference to wreck and salvage are contained in Part VIII. of the Merchant Shipping Act, 1854 (c).

SALVAGE.
General
nature of
service.

Independently of these statutory provisions, a salvor may be defined to be one who assists a vessel in distress, acting at the time as a volunteer, and not under any contract or duty which binds him to that particular service (d).

Salvage is not claimable in every case in which work and labour is done about the preservation of a ship and cargo; there must, usually, in order to support a claim for salvage, be skill and

Must not be
mere work
and labour.

(a) See 1 Beawes' Lex Merc. 241. An express demand, or an express acceptance, of salvage service actually performed is not a condition precedent to salvage reward; *The Annapolis*, Lush. 375. No claim for remuneration from the owner is given by the common law to those who preserve goods on shore, unless they interfere at the request of the owner. *Nicholson v. Chapman*, 2 H. Bl. 254.

(b) See the judgment of Sir C. Robinson in *The Calypso*, 2 Hagg. 218; and the judgment of Chief Justice Eyre in *Nicholson v. Chapman*, 2 H. & Bl. at p. 257. See also *Lohre v.*

Aitchison, 4 App. Cas. 761; and *Hartford v. Jones*, 1 Ld. Raym. 393.

(c) The General Salvage Acts in force before the M. S. Act, 1854, were the 9 & 10 Vict. c. 99, and the 16 & 17 Vict. c. 131 (ss. 39 to 51). The former of these statutes repealed the earlier Salvage Acts (which are very numerous), with the exception of the 1 & 2 Geo. 4, c. 76 (Supplementary Appendix, p. 127) and the 9 Geo. 4, c. 37, which relate to salvage within the jurisdiction of the Cinque Ports. See *post*, p. 669.

(d) See the judgment of Lord Stowell in *The Neptune*, 1 Hagg. 236.

Conversion of
towage into
salvage.

enterprise on the part of the salvors, and peril with respect to the property saved (e). Thus, if the services rendered to a vessel not disabled or in distress do not exceed the ordinary assistance which is rendered by a towing ship, no salvage can be claimed (f). If, however, a steamer renders assistance to a disabled vessel by towing, she may be entitled to salvage (g); and a service which commences as a mere towage service may, if new circumstances arise, become a salvage service (h). The conversion of towage into salvage service depends on the circumstances of each particular case (i); and the Courts watch with jealousy the conduct of steamtugs, in cases of this description, in order to see that the increased danger from which the ship may have been rescued, was not attributable to the fault of the tug. If it was caused by wilful misconduct or negligence, or want of reasonable skill on the part of the tug, she is never permitted to profit by her own wrong and can have no claim to salvage (k). Salvage may

(e) See the judgment in *The Clifton*, 3 Hagg. 120; *The London Merchant*, *id.* 395; *The Charlotte*, 3 W. Rob. 71; *Colby v. Watson*, 6 Moo. P. C. C. 334; and *The Prince of Wales*, 6 Notes of Cases, 39; *The Bomarsund*, Lush. 77. See also the cases cited in *Castellain v. Thompson*, 13 C. B., N. S. 105.

(f) *The Princess Alice*, 3 W. Rob. 138; *The Harbinger*, 16 Jur. 729; *The Upnor*, 2 Hagg. 3; *The Annapolis*, Lush. 355; *The Lady Egidia*, *id.* 513.

(g) *The Charles Adolphe*, Swa. 153; *The Strathnaver*, 1 App. Cases, 58, 65.

(h) See the judgment of Sir J. Nicholl in *The Isabella*, 3 Hagg. 428; *The Princess Alice*, *ubi sup.*; *The London Merchant*, 3 Hagg. 394; *The Reward*, 1 W. Rob. 174; *The Galatea*, 4 Jur., N. S. 1064; *The Albion*, 1 Lush. 282; *The Saratoga*, *id.* 318; *The I. C. Potter*, L. R., 3 A. & E. 292; *The Pericles*, Br. & L. 80; *The White Star*, L. R., 1 A. & E. 68; *The Canova*, L. R., 1 A. & E. 54. Where in a collision the innocent vessel was being towed by a tug, it was held that the latter was entitled to salvage for assisting the vessel which had caused the collision, the right not being affected by the 25 & 26 Vict. c. 63, s. 33, which required colliding vessels to render mutual assistance. *The Queen*, L. R., 2 A. & E. 53.

(i) The question in all these cases is whether supervening circumstances, such as stress of weather or otherwise,

have occurred such as to justify the steam tug in abandoning her contract of towage. *The I. C. Potter*, L. R., 3 A. & E. 298.

(k) *The Minnehaha (Ward v. M'Corkill)* Lush. 335; 8 C., 15 Moo. P. C. C. 133; *The Robert Dixon*, 5 P. D. 54—C. A. The following broad and luminous statement of the rules by which the Courts are governed in cases of this kind will be found in the judgment of the Privy Council in the former of these cases. "When," said the Court, "a steam boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so under all circumstances, and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments, as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated and which may render the fulfilment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of her task is interrupted, or cannot be completed in the mode which was origi-

be awarded in a case where cargo has been transhipped if the cargo was really in danger; but claims for salvage remuneration made under such circumstances have always been watched with jealousy by the Court of Admiralty (*l*). A person who merely hires men to assist in landing the cargo of a vessel that is stranded cannot claim as a salvor, although he is entitled to a fair remuneration for his trouble (*m*). Where a cutter approached as nearly as could be done with safety to a ship in distress which had signalled for help, and gave advice to her which led to her safety, it was considered in the Court of Admiralty that this constituted salvage service (*n*). Where the crew of a vessel are so reduced by death or sickness as to be insufficient for her navigation, the owners, master and crew of another vessel, which, on the high seas, supplies men from her own crew, are entitled to salvage (*o*).

Services rendered in transshipping or landing cargo.

By giving advice as to locality.

By putting men on board.

nally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and perform duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as an addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of the towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage. It is not disputed, that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. . . . To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or on the other, that the moment the performance of the contract is interrupted,

or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate;—would be alike inconsistent with the public interests. The rule, as it is established, guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled; parties enter into towage contracts on the face of it; and we should be extremely sorry that any doubt should be supposed to exist upon it. It is said, that it has never been brought before us for decision. If so, considering how often the rule has been acted upon, the almost necessary inference is, that it has never been made the subject of appeal, because it has been universally acquiesced in." See also *The White Star*, L. R., 1 A. & E. 68; and *The Cargo ex Capella*, L. R., 1 A. & E. 356.

(*l*) *The Hope*, 3 Hagg. 423; *The Westminster*, 1 W. Rob. 229.

(*m*) *The Watt*, 2 W. Rob. 70. See also *The Lively*, 3 W. Rob. 64, in which a claim for salvage under similar circumstances by an agent of Lloyd's was dismissed.

(*n*) *The Eliza*, Lush. 536. The mere giving of information is not, under ordinary circumstances, a salvage service. *The Little Joe*, Lush. 88.

(*o*) *The Roe*, Swa. 84; *The Charles*, L. R., 3 A. & E. 536; *The Active*, 14 Jurist, 606; *The Skibladner*, 3 P. D. 24.

In other
instances.

Where a vessel lying in dock was in danger of catching fire from the surrounding warehouses which were in flames, and was towed out into a place of safety by a steamer, it was held that salvage was payable (*p*).

Services which are performed on land in connection with assistance rendered at sea may be included in a claim for salvage (*q*). So also may the setting of salvors in motion (*r*). Where a suit for salvage was brought by a person who had taken charge of a stranded vessel under an agreement with the master, and had saved a valuable cargo, the Court allotted to him a reasonable remuneration; although it said that the services rendered were rather in the character of a meritorious agency than of a salvage service (*s*). But charges for repairs done to the salvaged ship cannot be included in a salvage claim (*t*).

Must be bene-
ficial.

If the services of the alleged salvors are not attended with, or followed by, benefit to the owners of the ship, or goods, or to the lives of persons belonging to the ship, no salvage can be claimed; for salvage reward is a compensation for benefit actually conferred in the preservation of property, not for meritorious exertions alone (*u*). Where a boat's crew, after labouring for a whole day at a vessel which was ashore, abandoned her, without any intention of returning, leaving their service incomplete, and she was afterwards got off by others, it was held that those who first gave assistance were not entitled to salvage, although some of them tendered their services to the real salvors before the vessel was got off (*x*). Where, however, salvage service is finally effected, those who meritoriously contribute to that result are entitled to share in the reward, although the part they took, standing by itself, would not in fact have produced it (*y*).

In such a case, not only the men who go on board the vessel in need, but also the owner, master and all the members of the crew of the salvaging ship are entitled to salvage. *The Charles*, L. R., 3 A. & E. 536. See also *The Nile*, L. R., 4 A. & E. 449.

(*p*) *The Tees*, Lush. 506.

(*q*) See the judgment in *The Mary Ann*, 1 Hagg. 161.

(*r*) *The Nile*, *ubi supra*; *The Sarah*, 3 P. D. 39.

(*s*) *The Favorite*, 2 W. Rob. 255. The Court has, under special circumstances, allowed a claim as agent and salvor to be united. *The Purissima Concepcion*, 3 W. Rob. 181; *The Cargo*

ex Honor, L. R., 1 A. & E. 87.

(*t*) *The Rainger*, 2 Hagg. 42.

(*u*) See *The India*, 1 W. Rob. 406; the judgment in *The Zephyrus*, *ib.* 330; *The Undaunted*, Lush. 92; and *The Edward Hawkins*, Lush. 515; *The Cheetah*, L. R., 2 P. C. 205.

(*x*) *The India*, *ubi supra*.

(*y*) *The Jonge Bastiaan*, 5 Rob. 322; *The Atlas*, Lush. 518; *The Santipore*, 1 Spks. 231; *The E. U.*, *ib.* 63; *The Melpomene*, L. R., 4 A. & E. 129. Salvors working under an engagement, that is to say, not mere volunteers, or going off from shore in answer to signals of distress, but men engaged by a ship in distress to assist her, may

The general rule above mentioned is, however, now subject to the statutory provisions contained in sects. 18 to 21 of the Merchant Shipping Act, 1873.

Compensation where improper use of statutory signals of distress.

Of these sections sect. 18 provides that the signals specified in the first schedule to the act shall be deemed to be signals of distress, and that any master of a vessel who uses or displays, or causes or permits any person under his authority to use or display, any of the said signals, *except in the case of a vessel being in distress*, shall be liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of such signal having been supposed to be a signal of distress, and that such compensation may, without prejudice to any other remedy, be recovered in the same manner in which salvage is recoverable (s).

The 20th section of the same act provides that her Majesty may from time to time by order in Council repeal or alter the rules as to the signals contained in the schedules to the act, or make new rules in addition thereto, or in substitution thereof, and that any alterations in or additions to such rules so made shall be of the same force as the rules in the said schedules.

Power to alter rules as to signals.

The 21st section allows any shipowner who is desirous of using, for the purposes of a private code, any rockets, lights, or other similar signals, to register such signals with the Board of Trade, and provides that the Board shall give public notice of the signals so registered in such manner as they may think requisite for preventing such signals from being mistaken for signals of distress or signals for pilots. The same section further provides that the Board may refuse to register any signals which in their opinion cannot easily be distinguished from signals of distress or signals for pilots; and that when any signal has been so registered the use or display thereof by any person acting under the authority of the shipowner in whose name it is registered shall not subject any person to any of the penalties or liabilities imposed by the act upon persons using or displaying signals improperly (a).

Private night signals.

be entitled to salvage reward, although their efforts are unsuccessful; if the ship is otherwise saved. *The Undaunted*, Lush. 90; *The Melpomene*, L. R., 3 A. & E. 129.

(z) See the M. S. Act, 1873, sched. I. The signals are, in the daytime, a gun fired at intervals of about a minute; the international code signal indicated by N. C.; or a distant signal consist-

ing of a square flag hoisted, with a ball below or above it: at night, a gun fired at intervals of about a minute; flames on the ship, or rockets or shells fired one at a time at short intervals.

(a) A list of the signals registered under this section previously to March, 1879, is printed in the Appendix, pp. cccclxi—ccccxvii.

Cases of recapture.

When a ship or cargo belonging to a British owner is captured by an enemy, and retaken either by a Queen's ship or by a private vessel, the owner is entitled by statute, upon proof of his title, to a restoration of the property subject to payment of salvage (*b*). It is the practice of the Prize Court of this country to extend the benefit of this rule to allies whose property has been recaptured by an English vessel, unless it appears that they belong to a state which deals with British property upon a less liberal principle; in which case the rule of reciprocity is applied (*c*).

Preservation of human life.

The preservation of human life has always been considered to be an important ingredient in estimating the amount to be paid to salvors where property had also been saved (*d*); but where no property was saved, but human life alone was preserved, the Court of Admiralty had, apart from statute, no power of remunerating the salvors, however meritorious their conduct might have been (*e*). The 1 & 2 Geo. 4, c. 75, empowered justices of the peace to decide on salvage claims for services rendered to ships or goods, "or for being instrumental in saving the life or lives of any person or persons on board," and gave an appeal to the Court of Admiralty to parties dissatisfied (*f*). It was held that this statute conferred no original jurisdiction on the Court of Admiralty to award salvage in cases where life alone had been preserved (*g*). This act was repealed by the 9 & 10 Vict. c. 99, which provided that every person (except receivers of Admiralty droits under the act) who should act or be employed in the

(*b*) See the 13 Geo. 2, c. 4, s. 18; the 17 Geo. 2, c. 34, s. 20; the 29 Geo. 2, c. 34, s. 24; the 45 Geo. 3, c. 72, s. 7; and the 55 Geo. 3, c. 60, s. 5. The last of these acts expired with the French war. The act now in force is the Naval Prize Act, 1864 (27 & 28 Vict. c. 25). Appendix, p. ccclix. It is permanent, and by sect. 40 (Appendix, p. ccliv) entitles a person retaking a vessel to one-eighth part of its value, or such lesser sum as may be agreed upon and approved of by a Prize Court. When, however, the recapture is made under circumstances of special difficulty, the Prize Court may award to the recaptors an amount more than one-eighth of the value of the prize, but not exceeding one-fourth. Before these statutes, if a ship of this country was captured, taken *infra præsidia*, and there condemned, the property in her was

entirely divested out of the owner, and he acquired no new right to her upon recapture. See the judgment of Sir W. Scott in *L'Actif*, Edw. 186. As to the salvage payable on rescues from the enemy, see *The Two Friends*, 1 Rob. 279.

(*c*) *The Santa Cruz*, 1 Rob. 50. As to salvage in cases where property has been recovered from pirates, see 22 & 23 Car. 2, c. 11; 11 Will. 3, c. 7, s. 11; and 13 & 14 Vict. c. 26; and *The Mariana*, 3 Hagg. 201.

(*d*) *The Aid*, 1 Hagg. 83; *The Ardincaple*, 3 Hagg. 151.

(*e*) *Ibid.*; see also the judgment in *The Zephyrus*, 1 W. Rob. 331, and *The Johannes*, Lush. 182; *The Willem III.*, L. R., 3 A. & E. 487. See also the judgment of Dr. Lushington in *The Fusilier*, Br. & L. 344.

(*f*) 1 & 2 Geo. 4, c. 75, ss. 8 and 9.

(*g*) *The Zephyrus*, 1 W. Rob. 329.

saving or preserving of any ship in distress, or of any part of the cargo, or "of the life of any person on board the same," should be paid a reasonable salvage (*h*). The terms of this statute were wider than those of the earlier act, but it contained no distinct provision as to the persons who were to pay salvage in case life alone was preserved, or as to the principle upon which the amount was to be estimated. The Court of Admiralty, therefore, notwithstanding this statute, continued to act in accordance with the decision upon the earlier act.

By recent acts of Parliament, however, this defective state of the law has been remedied, and the cases in which, and the persons by whom, salvage is to be paid have been clearly defined, as well as the principles upon which it should be estimated.

The provisions of the Merchant Shipping Act, 1854, with reference to salvage, are contained in Part VIII. of that act.

It is provided, by sect. 458 of that act, that whenever a ship or boat is stranded, or otherwise in distress, on the shore of any sea, or tidal water, situated within the limits of the United Kingdom, and services are rendered by any person,

- (1.) In assisting the ship or boat;
- (2.) In saving the lives of the persons belonging to the ship or boat (*i*);
- (3.) In saving the cargo or apparel, or any portion of it;

And whenever any wreck (*j*) is saved by any person other than a receiver within the United Kingdom;

Provisions of the Merchant Shipping Acts and the Admiralty Court Act, 1861, with respect to life salvage.

(*h*) 9 & 10 Vict. c. 99, s. 19. See also s. 21. This statute was repealed by the 17 & 18 Vict. c. 120.

(*i*) See the observations on this provision by Dr. Lushington in *The Bartley*, Swa. 199, and in *The Coromandel*, *ib.* 207. See also the judgment of Sir Robert Phillimore in *The Cairo*, L. R., 4 A. & E. 184. Priority is given to claims in respect of life salvage. See the M. S. Act, 1854, s. 459, and *The Coromandel*, *ubi supra*.

Passengers are included in these sections. See *The Fusilier*, 34 L. J., P. M. & A. 26; S. C., Br. & L. 341; *The Cargo ex Schiller*, 1 P. D. 473; 2 P. D. 145. See also *The Cairo*, L. R., 4 A. & E. 184.

(*j*) By the interpretation clause of the act (s. 2), the term "wreck" includes "jetsam, flotsam, lagan, and derelict, found in or on the shores of the sea or any tidal water." See further as to the meaning of "wreck,"

Com. Dig. tit. Wreck; *Sir Henry Constantine's case*, 5 Co. 106 a; *The Cargo ex Schiller*, 1 P. D. 473; 2 P. D. 145; *The Zeta*, L. R., 4 A. & E. 460; *Stackpole v. Reg.*, L. R. Irish, 9 Eq. 619, and the cases cited *infra*, p. 675, n. (*d*). Timber found floating at sea, without an apparent owner, having drifted from its moorings, is not "wreck" within the meaning of the act. *Palmer v. Rouse*, 3 H. & N. 505; see also *Legge v. Boyd*, 1 C. B. 92. Where goods were imported into this country, warehoused, entered for exportation, and shipped for Belgium, but the vessel was lost within the English port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner, it was held that they were chargeable with duty as "wreck" brought or coming into the United

There shall be payable by the owners of the ship, boat, cargo, apparel, or wreck, to the person by whom the services are rendered, or by whom the wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred in the performance of the services, or the saving of the wreck (*k*).

By sect. 459, salvage, in respect of the preservation of the life of any person belonging to any ship or boat, shall be payable by the owners in priority to all other claims for salvage; and in cases where the ship or boat is destroyed, or where the value of it is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life, the Board of Trade may in its discretion award to the life salvor, out of the Mercantile Marine Fund, any sum it may deem fit, in satisfaction of the amount of salvage so left unpaid (*l*).

Life salvage
to or by
foreign ships.

The above provisions relating to salvage of life did not apply to such salvage services when rendered by or to the crew of a foreign ship, or of a British ship in foreign waters (*m*), but by the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 9 (*n*), it is provided, that all the provisions of the Merchant Shipping Act, 1854, in regard to salvage of life from any ship or boat within the limits of the United Kingdom, shall be extended to the salvage of life from any British ship or boat, wheresoever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters. And by the Merchant Shipping Act, 1862, sect. 59, it is provided that whenever it is made to appear to the Queen that the government of any foreign country is

Jurisdiction
under Orders
in Council.

Kingdom, within the 3 & 4 Will. 4, c. 52, s. 50. *Barry v. Arnaud*, 10 A. & E. 646. By the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 21, the fishing boats within that act, and their rigging, gear, nets, buoys, floats, and fishing implements, are to be deemed included in the term "wreck" as used in any act relating to merchant shipping. See Appendix, pp. cclxxxiii, cccxiii.

(*k*) This section was only held to be applicable where the services were rendered within three miles of the coast of the United Kingdom. *The Leda*, Swa. 40. The owners of the cargo of a vessel, to which salvage services have been rendered, are liable to contribute to any portion of the claim of the salvors which may arise from the saving of the lives of persons belonging to the ship (*The Fusilier*, Br. & L. 341); and this is so even in

the case where the cargo arrested has been saved by the cargo-owners themselves, subsequently to the time when the life services were rendered. *The Cargo ex Schiller*, *ubi supra*.

The liability to pay a reasonable amount of salvage to life salvors under the section is not a general personal liability to be enforced, whether the ship or cargo is lost or not, but a liability limited to the value of the property saved from destruction, either by the salvors or by other means. *The Cargo ex Schiller*, 2 P. D. 145; *The Cargo ex Sarpedon*, 3 P. D. 28.

(*l*) See also the M. S. Act, 1854, s. 418. As to the Mercantile Marine Fund, see the M. S. Act, 1854, ss. 417—428.

(*m*) *The Johannes*, Lush. 182; *The Willem III.*, L. R., 3 A. & E. 487.

(*n*) Appendix, p. ccv.

willing that salvage shall be awarded by British Courts for services rendered in saving life from any ship belonging to such country when such ship is beyond the limits of British jurisdiction, the Queen may, by order in council, direct that the provisions of the Merchant Shipping Act, 1854, and of the Merchant Shipping Act, 1862, with respect to salvage for services rendered in saving life from British ships, shall in all British Courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within British jurisdiction or not (o).

Under the system established by these acts, the Court of Admiralty considers the preservation of human life as the most important of all elements in weighing the value of a salvage service (p). The taking off a desert island of a crew and passengers whose vessel has been wrecked, but who were not in any danger of drowning, has been held not to be a life salvage service (q). But in a case where, in pursuance of an agreement for a specified sum, services were rendered in taking the passengers of a wrecked vessel from off a rock which was so little above water that if bad weather had set in the lives of all would have been in imminent danger, the Court, although it set aside the agreement as inequitable in amount, held that the persons who had rendered the services were entitled to salvage remuneration as life salvors (r).

Application of above provisions as to life salvage.

The officers and crew of the ship in distress cannot, except under extraordinary circumstances, claim salvage for services rendered to their own ship, for they are bound by their engagement to perform these services (s). For the same reason salvage

WHO MAY CLAIM AS SALVORS.

When officers or crew of ship in distress may claim.

(o) An Order in Council under this section was made April 7, 1864, extending the provisions of the M. S. Acts, as to salvage, to Prussian ships. See Appendix, p. 96, and *The Deutschland*, 25 W. R. 755. As to the effect of such an Order in Council, its publication, alteration and revocation, and the mode of proving it, see the M. S. Act, 1862, ss. 61—64. See also the M. S. Act, 1876, ss. 37, 38, and *supra*, p. 585, note (i).

(p) *The Thomas Fielden*, 32 L. J., Adm. 61; *The Eastern Monarch*, Lush. 81.

(q) *The Cargo ex Woosung*, 44 L. J., Adm. 45.

(r) *The Medina*, 1 P. D. 272; 2 P. D. 6.

(s) See the judgment in *The Neptune*, 1 Hagg. 236; *The Le Jonet*, L. R., 3 A. & E. 556. In the latter case the mate of a damaged ship, who remained on board her after the rest of her crew had left and navigated her until she was towed into safety, was held entitled to claim as a salvor. See, as to the rule in America, *Hobart v. Drogan*, 10 Peters (American) Rep. 108, in which it was held that seamen, in the ordinary course of things, cannot become salvors, whatever may be the extent of the peril or the gallantry of their services; but that they may claim as salvors if extraordinary events occur, which dissolve their connexion with the ship *de facto*, or by operation of law, or if they exceed

circumstances have arisen which have rendered necessary exertions such as could not have been contemplated at the time of the making of the contract (*n*). The master of the vessel rendering assistance has power in these cases to bind his own interest and that of his employers (*o*), but an agreement entered into by him will not include the rest of the crew, if they have not concurred in it (*p*); nor will the Admiralty Division uphold an agreement by which the seamen bind themselves to receive only a particular apportionment of the reward in the case of their earning salvage, for such a bargain is contrary to principle, as it tends to deprive the salvors of their usual motives to enterprize (*q*).

Provisions of
the Merchant
Shipping
Acts.

By the Merchant Shipping Act, 1854, sect. 182, it is provided, that every stipulation in any agreement made under that act by which any seaman consents to abandon any right which he may have or obtain to salvage shall be wholly inoperative (*r*). This section has been declared by the Merchant Shipping Act, 1862, s. 18, not to apply to the case of any stipulation made by the seamen of any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by the ship to other ships. The effect of these sections is not to fetter the discretion of the Court in apportioning salvage, but to make such agreements as those referred to in the latter of the two sections not illegal, and to place them on the same footing on which they were before any legislation on the subject (*s*). Moreover, the provisions of

(*n*) *The William Brandt*, cited 2 W. Rob. 172. See also the judgment of the Privy Council in *The Minnehaha* (*Ward v. M'Corkill*), 15 Moo. P. C. C. 133, cited *ante*, p. 638, note (*k*).

(*o*) *The Britain*, 1 W. Rob. 40; *The Africa*, 1 Spks. 299, 300. The Court will hold the owners to such an agreement, though it be a hard bargain. *The Firefly*, Swa. 240. See also *The Africa*, *ubi supra*. Nor will such an agreement be lightly set aside because of a subsequent alteration in the weather, which renders the duty more onerous than was at first anticipated. *The Jonge Andries*, Swa. 226; *S. C.*, in P. C., nomine *Halsey v. Albertussen*, 11 Moo. P. C. C. 313; *The Waverley*, L. R., 3 A. & E. 369. See *post*, p. 673, the provisions of the M. S. Act, 1854, as to voluntary agreements made by salvors to abandon their lien and abide the decision of a Court of Admiralty, upon security being given them by the master or

person in charge of the ship.

(*p*) *The Britain*, 1 W. Rob. 40; *The Sarah Jane*, 2 W. Rob. 110; *The Elise*, Swa. 436, 440.

(*q*) *The Louisa*, 2 W. Rob. 22; *The Pensacola*, Br. & L. 310.

(*r*) See *The Enchantress*, Lush. 93.

(*s*) *The Ganges*, L. R., 2 A. & E. 379; *The Pride of Canada*, Br. & L. 208; 1 Mar. Law Cas. 406. An agreement that the vessel is to be employed on salvage service, and that the seamen will waive their right to salvage reward, need not be in writing, but must be clearly proved. *The Pride of Canada*, *ubi supra*. See also *The Rosario*, 2 P. D. 41. An arrangement entered into by a solicitor acting in good faith on behalf of seamen entitled to participate in an award of salvage as to the apportionment of the award, will not, in the absence of fraud or concealment, be set aside under this section. *The Afrika*, 5 P. D. 192.

the last-mentioned section do not in anywise affect the rights of seamen who have entered into such an agreement and subsequently render life salvage services to claim salvage for their services *as against property salvaged, or the owners of that property (t)*.

It is also provided by sect. 233 of the Merchant Shipping Act, 1854, that no assignment or sale of salvage made prior to the accruing thereof shall bind the party making the same, and that no power of attorney or authority for the receipt of salvage shall be irrevocable (u).

Sale or assignment of salvage invalid.

Where vessels sail as consorts, and under an agreement to give to each other mutual protection, it has been held that a claim for salvage could not be founded on services performed by the crew of one in assisting the other (v). But where a custom was alleged to exist in the whale fisheries for vessels to assist each other gratuitously in time of danger, it was held that, assuming its existence, it could not apply to a ship which was not embarked in any joint enterprize with the vessel in peril, but which had gone out from this country to render assistance (x).

Effect of custom not to claim salvage.

When salvage services are rendered to a ship owned by the same owners as the ship by which the services are rendered, but the cargo on board the salvaged ship belongs to third persons, the shipowners as owners of the salvaging ship are entitled to recover salvage against the cargo-owners (y). So, also, where salvage services are performed by one ship to another belonging to the same owners, the master and crew of the ship which has performed the salvage service are entitled to salvage remuneration, provided the services performed by them are not within the contract which they originally entered into with the owners, and for which they would be paid by them ordinary wages (z).

Persons entitled to claim where salvaging and salvaged ship belong to same owners.

Prior to the Judicature Act, it was held that a vessel was not disentitled to salvage merely because she belonged to the same

(t) *The Pensacola*, Br. & L. 306.

(u) See also 27 & 28 Vict. c. 24, s. 15, making void any assignment, sale or contract of, or relating to, salvage payable in respect of the services of any petty officer or seamen in the navy, or of any non-commissioned officer of marines or marine.

(v) *The Zephyr*, 2 Hagg. 43. See *The Caroline*, Lush. 334.

(x) *The Swan*, 1 W. Rob. 68. This custom was also set up in *The Margaret*, 2 Hagg. 48, note, but was not esta-

blished. See also *The Africa*, 1 Spks. 299, 302; *The Harriot*, 1 W. Rob. 439. Although such a custom has been held not to deprive the salvors of the right to salvage, it may affect the amount awarded. See the judgment of Lord Stowell in *The Trelawney*, 4 Rob. 228; *The Ganges*, 1 N. of Ca. 87.

(y) *The Miranda*, L. R., 3 A. & E. 561.

(z) *The Sappho*, L. R., 3 P. C. 690, and the cases there cited. See also *The Scout*, L. R., 3 A. & E. 512.

owners as a vessel that had occasioned the necessity for the salvaged services proceeded on being rendered (a).

Where salving
ship chartered
to owners of
salved ship.

The East India Company was held not to be exempt from the payment of salvage to the crew of a ship chartered to them for services rendered to a ship which belonged to them (b); and it is now settled, that the owners of a vessel rendering salvage services are not debarred from claiming salvage from the mere fact that they are also charterers of the vessel assisted (c). Where, however, the crews of two ships belonging to the same owner assisted another ship which was not only chartered to him, and carried a cargo belonging to him, but of which he had appointed the master and crew, so that the owners were divested of all possession or control, the Court refused to award salvage to the owners of the salving vessel (d).

The effect of the performance of salvage services by Queen's ships will be mentioned in a later part of this Chapter (e).

REMEDIES OF
SALVORS.
Possessory
lien.

Where ser-
vices rendered
by ship's
agent.

Salvors, who retain possession of the property they have salvaged, have a possessory lien on it at common law, and might have continued their possession until they were remunerated (f).

It has recently been held that a ship's agent who, with the authority of the captain, expended labour and money on getting a cargo which had come to shore to a place of safety, had a lien on the cargo for his charges against the owner, although they were incurred without his sanction (g).

Action in
Queen's
Bench
Division.

The right to salvage may be determined in the Queen's Bench Division in an action brought by the claimant upon the implied contract to remunerate him, or in an action by the owner of the ship or goods for their detention (h). No action

(a) *The Glengaber*, L. R., 3 A. & E. 534. But possibly since the Judicature Act a counter-claim might be maintained.

(b) *The Waterloo*, 2 Dods. 433: affirmed, *nomine The East India Co. v. Moffatt*, Delegates, July 12, 1821.

(c) *The Collier*, L. R., 1 A. & E. 83. See also *The Sappho*, L. R., 3 P. C. 690.

(d) *The Maria Jane*, 14 Jur. 857.

(e) *Post*, p. 671.

(f) *Hartford v. Jones*, 1 Ld. Raym. 393. See also the judgment of Eyre, C. J., in *Nicholson v. Chapman*, 2 H. Bl. 257; *Baring v. Day*, 8 East, 57. In the case of a derelict, the salvors have a right to exclusive possession of

the vessel; but unless she has been wholly abandoned, they are bound to give up charge to the master on his appearing, and he may refuse to employ them further. *The Champion*, Br. & L. 69, where see also as to what is a derelict. See also the judgment of Sir Robert Phillimore in *The Kathleen*, 4 L. R., A. & E. 269. As to the statutory duty of salvors to deliver up the property salvaged into the custody of the receiver of wreck of the district, see *infra*, pp. 655, 677.

(g) *Hingston v. Wendt*, L. R., 1 Q. B. D. 367. See also *supra*, p. 640.

(h) *Newman v. Walters*, 3 B. & P. 612; 2 Chit. Plead. 54.

can be brought by a seaman against the owner of his ship for his share of salvage money awarded to the owner by justices acting under the provisions of the Merchant Shipping Act, 1854, and paid to him, no apportionment of the salvage having been made by the justices (i).

Salvors may also enforce their claims in the Admiralty Division either by a suit *in rem* against the ship, freight, or goods, or *in personam* against the owners of any property salvaged (k). They may also, in certain cases, for the same purpose, take proceedings before the magistrates or a County Court judge, under the Merchant Shipping Acts (l); or in a County Court having Admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868 (m).

Action in
Admiralty
Division.

The Court of Admiralty had, by ancient usage, jurisdiction over all salvage cases arising on the high seas. By modern statutes the jurisdiction of this Court was extended to cases in which the ship salvaged was within the body of a county at the time when the services were rendered (n), and it was enabled, as we have already seen, to award salvage, in certain cases, not only where ships or boats or their cargoes or apparel had been salvaged, but also where life salvage services alone had been rendered, or wreck (o) had been saved by any person other than a receiver of wreck (p). And by the Merchant Shipping Act,

Jurisdiction
of Admiralty
Division.

(i) *Atkinson v. Woodhall*, 1 H. & C. 170; and see *post*, pp. 653, 657, 663, note (c).

(k) *The Hope*, 3 C. Rob. 215; *The Meg Merrilies*, 3 Hagg. 346; *The Rapid*, 3 Hagg. 419; *The Cargo ex Sarpedon*, 3 P. D. 28.

(l) See *post*, pp. 654, note (f), 658. Before this act these proceedings were regulated by the 9 & 10 Vict. c. 99, which is now repealed. See as to the recovery of salvage within the jurisdiction of the Cinque Ports, *post*, p. 668.

(m) 31 & 32 Vict. c. 71, s. 3 (Appendix, p. cccviii), and *infra*, p. 653.

(n) 3 & 4 Vict. c. 65, s. 6, Appendix, p. cccxiii; 9 & 10 Vict. c. 99, s. 40, which last-mentioned act is now repealed. It was decided by Dr. Lushington that the 3 & 4 Vict. c. 65, s. 6, did not confer on the Court of Admiralty any jurisdiction to award salvage for the preservation of a raft of timber found afloat in a harbour within the body of a county. *In the matter of a Raft of Timber*, 2 W. Rob. 251, 255, note.

(o) As to the meaning of "wreck," see *supra*, p. 643, n. (j).

(p) *Supra*, pp. 642—645. The 458th

section of the M. S. Act, 1854, expressly enabled the Court, in cases where that section applied (see *supra*, pp. 643—644), to cause repayment to be made to the salvors of all expenses properly incurred in rendering the services proceeded on. Independently of this section the Court of Admiralty always exercised the power of indemnifying salvors where it was shown that in consequence of salvage services rendered by them they had sustained actual loss or incurred definite expenses; in some cases decreeing to them compensation distinct from the amount awarded as salvage; in other cases including in the salvage award whatever the salvors might be entitled to in respect of such damages or expenses. *The Oscar*, 2 Hagg. 261; *The Martha*, 3 Hagg. 436; *The Saratoga*, Lush. 318; *The City of Chester*, 6 P. D. where the shaft and engines of the salvaging vessel were injured in rendering the services. See also *The Louisa*, 3 W. Rob. 99; *The Norden*, 1 Spks. 185; *The Houthandel*, 1 id. 25, cases of fishing vessels.

1854, sect. 476, it is expressly provided, that, *subject to the provisions of that act (n)*, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas, or within the body of any county, or partly in one place and partly in the other, and whether the wreck was found at sea or cast upon the land, or partly in the sea and partly on land. This Court had also power to deal with all questions as to the title to or ownership of any ship, or the proceeds thereof remaining in the registry of the Court, which arose in any cause of salvage (o). The jurisdiction of the Court was not ousted by the fact that the parties had entered into an agreement to refer the claim in dispute to arbitration (p); nor was the remedy of salvors in that Court in any way affected by their abandoning the possession of the vessel which they had salvaged (q).

By the Judicature Act, 1873, the jurisdiction of the Court of Admiralty is transferred to and vested in the High Court of Justice, and by virtue of the same act all causes and matters within the exclusive jurisdiction of the former Court are now assigned to the Admiralty Division (r).

The Admiralty Division has now jurisdiction in all cases of salvage, however small the amount claimed, or the value of the property salvaged (s).

Proceedings
in Admiralty
where salvage
is due on cap-
ture of royal
fish.

In cases where royal fish, such as whales or sturgeon, are captured near the coasts of England, the captors are entitled to salvage, and such salvage is recoverable by proceedings either in the Admiralty Division, or, if the capture is made within the jurisdiction of the Cinque Ports, in the Court of Admiralty of the Cinque Ports (t).

Maritime
lien.

Where salvage service have been rendered to the lives belonging to any ship, or to ship, freight or cargo, a maritime lien attaches on the whole of the property salvaged. And this lien may

(n) See the M. S. Act, 1854, s. 460, and the M. S. Act, 1862, s. 49, *post*, pp. 654—657, enabling proceedings in certain cases to be taken before magistrates or a County Court judge. See also the M. S. Act, s. 458, *supra*, pp. 643, 644.

(o) 3 & 4 Vict. c. 65, s. 4 (Appendix, p. ccciii). As to the jurisdiction of the Court in causes of apportionment of salvage, see *post*, p. 663.

(p) *La Purissima Concepcion*, 13 Jur. 545.

(q) *The Eleanor Charlotta*, 1 Hagg. 156. As to the jurisdiction of the Court of Admiralty to enforce salvage bonds, see *infra*, p. 656, n. (e), 673.

(r) 36 & 37 Vict. c. 66, ss. 16, 34, 42.

(s) See *The Empress*, L. R., 3 A. & E. 502, and *post*, p. 658.

(t) *The King in his Office of Admiralty v. The Lord Warden of the Cinque Ports*, 2 Hagg. 438.

be enforced within a reasonable time (v), by a suit *in rem* (x) in the Admiralty Division or any other Court of Admiralty jurisdiction (y).

The maritime lien conferred by salvage ranks above all other maritime liens which have attached on the property salvaged previously to the time when the salvage services were rendered (z).

County Courts having Admiralty jurisdiction may try and determine claims for salvage where the value of the property saved does not exceed 1,000*l.*, or in which the amount claimed does not exceed 300*l.*, and also in cases involving larger amounts where the parties agree by a memorandum signed by themselves, their solicitors or agents, that any County Court having Admiralty jurisdiction and specified in the memorandum shall have jurisdiction (a).

Actions in County Courts having Admiralty jurisdiction.

The provisions of the Merchant Shipping Act, 1854, with reference to the jurisdiction of magistrates in salvage cases and the duties of receivers of wreck are contained in the eighth part of that act; they have been amended and extended by the Merchant Shipping Act, 1862 (b).

Jurisdiction of magistrates and County Court judges and duties of receivers of wreck.

(v) *The Royal Arch*, Swa. 285; *The Samuel*, 15 Jurist, 407; *The Rapid*, 3 Hagg. 419; *The Ragasthan*, Swa. 171.

(x) The wearing apparel of the master, seamen, and the luggage and personal effects of passengers are not liable to contribute, and therefore are exempt from arrest. See *The Willem III.*, L. R., 3 A. & E. 487, and the authorities there cited *arguendo*.

(y) *The Fusilier*, Br. & L. 341; *The Cargo ex Schiller*, 2 P. D. 145; *The Carrier Dove*, 2 Moo. P. C. C., N. S. 243; *The Gustaf*, Lush. 506, where a maritime lien for salvage was held to be entitled to priority over the possessory lien of a shipwright, into whose yard the vessel came after the salvage services had been rendered. The ship and the cargo must each contribute to the amount of salvage remuneration in proportion to its value. *The Emma*, 2 W. Rob. 219; *The Longford*, 6 P. D.; *The Pyrene*, Br. & L. 189. For the jurisdiction and practice of the Court of Admiralty in salvage causes, see Williams & Bruce, *Adm. Practice*, c. vi.

(z) *The W. F. Safford*, Lush. 69; *The Gustaf*, Lush. 506; *The Sabina*, 7 Jurist, 182; *The Coromandel*, Swa. 208; *The Att.-Gen. v. Norstedt*, 3 Price, 136. See also *The Cargo ex Galam*, at p. 181,

and *supra*, pp. 86, 242, 619, note (t).

(a) The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71, Appendix, p. cccxviii), s. 3, and Orders in Council of the 14th of Jan., 1869; the 31st of March, 1870; the 16th of May, 1871; the 16th of May, 1878. See Appendix, pp. 19—25. A County Court having admiralty jurisdiction has, under this section, jurisdiction to entertain a suit for distribution of salvage where the amount which the Court is asked to award does not exceed 300*l.*, notwithstanding that the value of the property saved exceeds 1,000*l.* *The Glannidanta*, 2 P. D. 45. As to costs where suits which might be brought in a County Court under the act are commenced in the Admiralty Division or Queen's Bench Division, see sect. 9, now impliedly repealed; *Tenant v. Ellis*, 6 Q. B. D. 46; *Garnett v. Bradley*, 3 App. Cas. 944; *Ex parte the Mercers Co.*, 10 Ch. D. 481. And as to appeals, see ss. 26—31. No appeal is to be allowed unless the amount awarded exceeds 50*l.* See sect. 31; and *The Falcon*, 3 P. D. 100. As to the Admiralty jurisdiction conferred by the act on the Passage Court of Liverpool, see s. 25; *The Dowse*, L. R., 3 A. & E. 135; *The Ganges*, 6 P. D. 247.

(b) See *post*, pp. 657, 658.

It will be convenient to state, first, how the law stood under the earlier statute, and then to mention how its provisions have been altered by subsequent legislation.

Under Merchant Ship-
ping Act,
1854.

By sect. 460 of the Merchant Shipping Act, 1854, it was provided, that whenever a dispute with respect to salvage arose in the United Kingdom (*a*), *elsewhere than within the boundaries of the Cinque Ports* (*b*), between the owners (*c*) of a ship, boat, cargo, apparel or wreck (*d*), and the salvors, as to the amount of salvage, and the parties to the dispute could not agree as to the settlement of the claim by arbitration or otherwise, if the sum claimed (*e*) did not exceed 200*l.*, the dispute should be referred to the arbitration of any two justices of the peace resident (in cases of wreck) at or near the place where the wreck was found, and (in cases of salvage) at or near the place where the ship or boat was lying, or at or near the first port or place in the United Kingdom into which the ship or boat was brought after the occurrence of the accident (*f*). By the same section it was provided that if the sum claimed exceeded 200*l.*, the dispute might, by consent, be referred to arbitration in the manner above mentioned; but if the parties did not consent to this course, the question should be determined, in England and Ireland (*g*), by the Court of Admiralty, and in Scotland by the Court of Session. If, however, the claimants did not recover a greater sum than 200*l.*, they were not, under the provisions of this act, to recover any costs, charges, or expenses unless the Court certified that the case was a fit one to be tried in a Superior Court (*h*). It was also provided by this

(*a*) That is, within three miles of the coast. See *The Actif*, Swa. 257; *The Leda*, Swa. 40.

(*b*) Salvage disputes within the Cinque Ports are still determinable as before the passing of this act. *The Jeune Paul*, L. R., 1 A. & E. 336, and *post*, p. 669.

(*c*) The word "owner," as here used, has been held to include mortgagees. *The Louisa*, Br. & L. 159.

(*d*) As to what is "wreck," see *post*, p. 675, note (*d*).

(*e*) The words "the sum claimed" has been held to mean the sum claimed before legal proceedings are taken. *The William and John*, Br. & L. 49, and *post*, p. 659. See also *The Empress*, L. R., 3 A. & E. 502.

(*f*) The justices should deal with any disputed question as to the amount of salvage payable to each salvor.

Atkinson v. Woodall, 31 L. J., M. C. 147.

(*g*) As to the jurisdiction of the Admiralty Court in Ireland, see the Admiralty Court (Ireland) Act, 1867 (30 & 31 Vict. c. 114), s. 27.

(*h*) This limitation as to costs is no longer in force so far as the Admiralty Division is concerned. See *Tenant v. Ellis*, 6 Q. B. D. 46, and the cases cited *supra*, p. 653, n. (*a*). The section was held to extend only to cases where the salvage service was performed within the limits of the United Kingdom, that is, within three miles of the coast. See *The Actif*, Swa. 237; *The Leda*, Swa. 40; see also the observations of Dr. Lushington in *The Fenix*, Swa. 16, as to the principles upon which the Admiralty Court acted in certifying that a case was fit to be tried there.

section that every dispute with respect to salvage might be heard and adjudicated upon on the application either of the salvor or of the owner of the property salvaged, or of their agents (i).

By sect. 461 of the Merchant Shipping Act, 1854, it was provided that whenever in pursuance of the act any dispute as to salvage was referred to the arbitration of justices, they might either determine the matter themselves (with the assistance, if they wished it, of an assessor), or they might appoint some person conversant with maritime affairs to act as umpire (j).

Power to call
in assessors
or appoint
umpire.

By sect. 464, an appeal was given against the award, in Appeal. the cases mentioned above, to the Court of Admiralty in England and Ireland, and to the Court of Session in Scotland, whenever the sum in dispute (k) exceeded 50*l.* (l). And by sect. 465, it was enacted that the justices should, in cases of appeal, transmit to the Court of Appeal a copy of the proceedings before them or their umpire, and of the award, together with a certificate of the gross value of the article in respect of which the salvage was claimed.

The following rules are laid down by sect. 468 of the act with reference to the duties of the persons appointed receivers of wreck under the act (m):—

Detention of
salvaged prop-
erty by
receivers.

- (1.) If any salvage is due to any one under the act for services rendered in assisting any ship or boat, or saving the lives of persons belonging to her, or the cargo or apparel, the receiver is to detain the ship or boat, and the cargo and apparel, until payment of the salvage, or process has been issued by some competent Court for their detention;
- (2) If the salvage is due in respect of the saving of any wreck (and the wreck is not sold as unclaimed) (n), the

(i) See *The Cleopatra*, 3 P.D. 145. It is to be observed that the group of sections containing this provision are headed "Salvage in the United Kingdom."

(j) By ss. 461—463 it was declared, that the awards must be made within forty-eight hours after the question had been referred, unless the time was enlarged by the referees; that the assessor or umpire should receive for his services such a sum not exceeding 5*l.*, as the Board of Trade might direct; and that the costs of the arbitration should be in the discretion of the referees.

(k) As to the meaning of these words, see *The Andrew Wilson*, Br. & L. 56; 32 L. J., P. M. & A. 104; *The Mary Anne*, Br. & L. 334; and *The Generous*, L. R., 2 A. & E. 57, and *post*, p. 659.

(l) The same section provided, that notice of appeal must be given to the justices within ten days after the date of the award, and that the proceedings must be commenced in the Court of Appeal within twenty days from that date.

(m) As to the appointment and remuneration of these officers, see the M. S. Act, 1854, ss. 439, 455—457, and *post*, p. 675.

(n) See *infra*, p. 678.

receiver is to detain it until payment, or the issuing of process, as above mentioned.

But the receiver may (where no such process had been issued), release from his custody the ship, boat, cargo, apparel, or wreck, upon security being given to him for the amount of salvage due (o).

Sale of salvaged property by receivers.

By sect. 469 of this act, it is provided that the receiver may sell any ship, boat, cargo, apparel, or wreck detained by him for non-payment of salvage, rendering the overplus to the owners after payment of salvage fees and expenses, in the following cases (p):—

- (1.) Where the amount of salvage not being disputed is not paid within twenty days after it became due;
- (2.) Where the amount being disputed no appeal lies from the first tribunal to which the question was referred, and payment has not been made within twenty days after its decision;
- (3.) Where the amount being disputed an appeal lies to another tribunal, but the amount was not paid within twenty days after the decision of the first tribunal, and no proceedings in appeal had been taken within that period.

The duties of the receivers of wreck with respect to the apportionment of salvage will be noticed in a later part of the chapter (q).

(o) It was provided by ss. 468, 495 and 497 of this act, that where the claim for salvage exceeded 200*l.*, the Court of Admiralty of England, or in Ireland or Scotland the Court of Admiralty in Ireland or the Court of Session respectively, might determine as to the amount of security and sufficiency of the sureties, and whenever the bond or other security given to the receiver was for an amount exceeding 200*l.*, proceedings might be instituted in that Court by either of the parties for the purpose of having the questions arising between them adjudicated on, and the Court might enforce payment of the security as if bail had been given; and that these bonds should be exempt from stamp duty. As to the meaning of "Court of Session" as used here, see the M. S. Act, 1862, s. 51, and *post*, p. 668, n. (i). See *post*, p. 673, as to voluntary agreements by salvors to give up their lien upon security being given them. Where a receiver of wreck releases salvaged property upon security, the salvors have no right to detain it, or to arrest it by

warrant from the Admiralty Court. *The Lady Katherine Barham*, Lush. 404; *The John Evans*, 43 L. J., Adm. 9. See also the M. S. Act, 1862, s. 52.

(p) See also sect. 453 as to the sale by the receiver of goods of a perishable nature or small value. By sect. 470 of this statute it is provided, that the owners of any wreck who establish their claim within a year from the date at which it came into the receiver's possession, shall be entitled to have it delivered up to them, subject to the above-mentioned deductions. By sect. 498 of the act it is provided, that whenever the amount of salvage has been ascertained and exceeds 200*l.*, the Court of Admiralty shall have power to apportion it among the persons entitled. By sect. 52 of the M. S. Act, 1862, the delivery up of any wreck by any receiver does not affect any question as to the right or title to the wreck that may be raised by third parties, or as to the title to the soil on which the wreck is found. See *post*, p. 678.

(q) See *post*, p. 665.

These are the main provisions of the Merchant Shipping Act, 1854, with reference to salvage; they are still in force, subject to the important additions and amendments contained in the following enactments:

By sect. 49 of the Merchant Shipping Act, 1862, the above-mentioned provisions of the VIIIth Part of the Merchant Shipping Act, 1854, are amended as follows:—

- (1.) These provisions are extended to all cases in which the value of the property saved does not exceed 1,000*l.* (*r*), as well as to the cases provided for by the Merchant Shipping Act, 1854;
- (2.) They are to be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not;
- (3.) One of the principal secretaries of state, or in Ireland the lord lieutenant or other chief governor or governors, may appoint out of the justices for any borough or county a rota of justices, by whom jurisdiction in salvage cases shall be exercised;
- (4.) When no such rota is appointed, the salvors may, by writing addressed to the justice's clerk, name one justice, and the owner of the property saved in like manner may name the other;
- (5.) If either party fails to name a justice within a reasonable time, the case may be tried by two or more justices at petty sessions;
- (6.) Any stipendiary magistrate, and in England any county court judge (*s*), and in Scotland any sheriff or sheriff substitute, and in Ireland the recorder of any borough or the chairman of quarter sessions in any county, may exercise the same jurisdiction in salvage cases as is given to two justices;

Jurisdiction of magistrates and County Court judge, and duties of receivers of wreck under Merchant Shipping Act, 1862.

(*r*) This has been held to mean the value of the property when first brought into safety by the salvors and not at any subsequent period. The onus of proving that it is of less value than that stated lies on the owner. *The Stella*, L. R., 1 A. & E. 340. See also *The Norma*, Lush. 124. As to services rendered within the boundaries of the Cinque Ports see *The Maria Luisa*, Swa. 67; *The Jeune Paul*, L. R., 1 A. & E. 338, in which last case it was held that the concurrent

jurisdiction of the High Court of Admiralty with the Court of Admiralty of the Cinque Ports and the Commissioners appointed by the Lord Warden was not affected by the provisions of the above-mentioned section of the M. S. Act, 1862. See also *post*, p. 668.

(*s*) As to the procedure under this section where proceedings are taken before a County Court judge, see *Beadnell v. Beeson*, L. R., 3 Q. B. 439.

- (7.) One of the principal secretaries of state may determine a scale of costs to be awarded in salvage cases by justices or Courts (s) acting under these provisions;
- (8.) All the provisions of the Merchant Shipping Act, 1854, relating to summary proceedings in salvage cases, and to the prevention of unnecessary appeals in these cases, are, except so far as the same are altered by the later act, to extend and apply to all the proceedings under both the statutes.

It is also provided by sect. 50 of the Merchant Shipping Act 1862, that whenever any salvage question arises the receiver of wreck for the district may, upon application from either of the parties, appoint a valuer to value the property in respect of which the claim is made, and must, when the valuation is returned to him, give a copy of it to both parties; and any copy of this valuation, purporting to be signed by the valuer, and attested by the receiver, is receivable in evidence in any subsequent proceeding (t).

Jurisdiction of Admiralty Division not affected by above provisions.

It was held in a case decided in the Court of Admiralty before the passing of the County Courts Admiralty Jurisdiction Act, 1868, which, as we have seen (u), has given jurisdiction in salvage cases to County Courts having Admiralty jurisdiction where the value of the property salvaged does not exceed 1,000*l.*, or the amount claimed does not exceed 300*l.*, that the effect of the 460th section of the Merchant Shipping Act, 1854, and the 49th section of the Merchant Shipping Act, 1862, taken together was, that if the sum claimed by the salvors did not exceed 200*l.*, or if the property salvaged did not exceed 1,000*l.*, the dispute must have been referred to the justices, or other summary jurisdiction, and that the jurisdiction of the Court of Admiralty was taken away (x). Since the passing of the County Courts Admiralty Jurisdiction Act, 1868, it has, however, been decided that by virtue of the operation of the provisions therein contained, the jurisdiction in salvage cases possessed by the Court of Admi-

(s) The scale of fees and costs which has been issued by the Secretary of State in pursuance of the above provision, will be found in the Appendix, p. cccxxxvi.

(t) By s. 51 of this act the words "Court of Session," used in s. 468 of the M. S. Act, 1854, are to be deemed

to include either division of the Court, or the Lord Ordinary officiating on the bills during vacation.

(u) See *supra*, p. 653.

(x) *The William and John*, Br. & L. 49; *S. C.*, 32 L. J., P. M. & A. 102; see also *Beadnell v. Beeson*, L. R., 3 Q. B. 439; *The Kate*, Br. & L. 218.

ralty before 1854, has been restored, and now, subject to the liability of being condemned in costs in the discretion of the Court, any salvor may take proceedings and recover salvage in the Admiralty Division, however small the amount of his claim, or the value of the property proceeded against (*y*).

It was held by the Court of Admiralty that the limitation of the jurisdiction of the justices by the 49th section of the Merchant Shipping Act, 1862, to cases where the claim did not exceed 200*l.*, or the value of the property saved did not exceed 1,000*l.*, depended (so far as related to the sum claimed) on the claim made antecedently to any proceedings (*z*). So, the words "sum in dispute," as used in sect. 464 of the Merchant Shipping Act, 1854, were held to refer to the sum originally claimed, and not to the sum awarded and appealed against (*a*).

Meaning of sum claimed and sum in dispute.

The Admiralty Division acts in awarding salvage on liberal principles (*b*). In cases of salvage, except where the property is recaptured or recovered from pirates (*c*), the amount awarded bears no fixed proportion to the extent of the property saved, but depends in each particular case upon the value of the property saved, the danger from which it has been rescued, the time expended, the risk incurred by the salvors, the success of their efforts, the value of the property by the use of which the services were rendered, and the danger to which it was exposed (*d*). In cases where property alone is saved, the risk of

AMOUNT AWARDED, AND HOW APPORTIONED.
General rules.

(*y*) See *The Empress*, L. R., 3 A. & E. 502; *Tenant v. Ellis*, 6 Q. B. D. 46.

(*z*) *The William and John*, Br. & L. 49.

(*a*) *The Andrew Wilson*, 32 L. J., P. M. & A. 104; Br. & L. 56.

(*b*) See the cases cited below, and the judgments in *L'Espérance*, 1 Dods. 49, and *The William Beckford*, 3 Rob. 355.

(*c*) As to the proportion awarded in cases of recapture, see *supra*, p. 642. On recovery from pirates the amount to be awarded to the salvors is fixed by statute at one-eighth; see 13 & 14 Vict. c. 26.

Before the Prize Acts, the amount of salvage awarded by the Court of Admiralty in cases of re-capture, bore no fixed proportion to the value of the property. See as to these acts, *ante*, p. 642, note (*b*).

(*d*) See *The Clifton*, 3 Hagg. 117, 120; *The Cleopatra*, 3 P. D. 149; *The Salacia*, 2 Hagg. 262; and the judg-

ments in *The Thetis*, 3 Hagg. 62; *The Euell Grove*, *ib.* 221; *The Traveller*, *ib.* 371; *The London Merchant*, *ib.* 395; and *The Industry*, *ib.* 204. See also *The Graces*, 2 W. Rob. 294; *The Fusilier*, Br. & L. 350; *The Norden*, 1 Spka. 185; *The Kingalock*, *ib.* 267; *The Amérique, nommée The Compagnie Générale Transatlantique v. The Owners of The Barry, The Auburn, and The Spray*, L. R., 6 P. C. 468. With regard to the mode in which salvage of freight should be reckoned, see *The Norma*, Lush. 124. The appraisement of the property saved by the marshal of the Court is conclusive evidence of its value. *The Cargo ex Venus*, L. R., 1 A. & E. 50. The costs of such appraisement must be borne by the party who obtained the appraisement if there is a substantial difference between his valuation and that of the marshal. *The Paul*, L. R., 1 A. & E. 57. The value of the salvor's pro-

avoiding a policy of insurance by deviation (e), or becoming liable to the owner of cargo (f), may also be taken into consideration. The Court looks also not merely to the exact *quantum* of service performed in the case itself, but to the general interests of navigation and commerce, which are protected by exertions of this nature (g). In cases of derelict as much as one half of the

property endangered in the service does not limit the salvage remuneration to that sum. *The Fuelier*, Br. & L. 349.

(c) *The True Blue*, *nomine Papayanni v. Hocquard*, L. R., 1 P. C. 250; *post*, p. 666, note (j).

(f) *Scaramanga v. Stamp*, 4 C. P. D. 316; 5 C. P. D. 296; see also *The Silesia*, 5 P. D. 177; *The Sir Ralph Abercrombie*, *nomine Carmichael v. Brodie*, L. R., 1 P. C. 454.

(g) See the judgment of Lord Stowell in *The William Beckford*, 3 Rob. 355; *The Sarah*, 1 Rob. 313, note; *The Hector*, 3 Hagg. 90; *The Industry*, *ib.* 203; *The Clifton*, *ubi supra*.

In the instructions to receivers of wreck and droits of Admiralty, issued by the Board of Trade in 1866, the main ingredients of salvage service are described (by Art. 94) as follows:—

- “(a) The degree of danger from which the lives or property are rescued.
- (b) The value of the property saved.
- (c) The risk incurred by the salvors.
- (d) The value of any of the property by the use of which the services are rendered, and the danger to which it was exposed.
- (e) The skill shown in rendering the services.
- (f) The time and labour occupied.

Where all these concur in the performance of any salvage service, the reward ought to be large; and in proportion as fewer of these ingredients are to be found, so should the reward be less. But where scarcely any, or only the last of them exist, the service can hardly be denominated a salvage service; it is little or nothing more than mere work and labour, and should be rewarded accordingly.

- (a) In estimating the degree of danger from which the lives or property were rescued, regard should be had to,
 - The damage sustained by the vessel itself;
 - The nature of the locality from which she was rescued;
 - The season of the year when the services were rendered, and if the

weather at the time was not tempestuous, the probability or improbability of its becoming so;

Ignorance or knowledge (as the case may be) of the locality on the part of the master and other persons on board the vessel saved.

(b) The value of the property saved is also an essential ingredient in the amount of remuneration to be awarded. If the value of the property be small, the reward must be small; if large, a greater reward may be given, for in proportion to that value is the benefit to the owners, which is one of the primary considerations in settling the amount of remuneration. The amount of the reward should not, however, increase in direct proportion to the value of the property. The object of the Courts is to give an adequate reward; Courts of Admiralty, therefore, always give a smaller proportion when the property is large.

As a general rule it may be stated that Courts of Admiralty very seldom, if ever, give more than one-half of the value of the property saved. This should, in fact, be regarded as the maximum, except in some few cases where the services have been highly meritorious, and the value of the property saved is but small.

(c) The risk incurred by the salvors themselves, if necessarily incidental to the performance of the service, is the most important ingredient in estimating the amount of salvage to be awarded. The value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this be satisfactorily proved to have been hazarded, the salvors should be most liberally rewarded; and when not only risk has been incurred, but actual loss of life has ensued, a still larger amount of salvage should be given.

(d) The value of the property by which the services have been rendered is not an unimportant element in estimating the reward to be given, provided it has been exposed to risk and danger in the performance of the ser-

value of the property saved is sometimes decreed (*h*). But there is no fixed rule even in these cases, although more than one half or less than one third is rarely given (*i*). In some cases, indeed, where the claim has been against king's ships, or the property saved has been very small (*k*), or the salvage operations have been of long continuance (*l*), or effected by expensive

vice. The greater the risk incurred by the salvors or their property, the greater should be the remuneration. It is from the same consideration that no salvage is allowed for the use of her Majesty's ships, or the consumption of stores and articles belonging to her Majesty, as even were the vessel totally lost in rendering the services, the loss would not fall on the salvors.

(e) The skill and knowledge of the salvors is an essential ingredient in a meritorious salvage service. The same skill, however, that would be required from duly-licensed pilots, is not to be expected from ordinary smackmen or boatmen assuming the management of vessels in cases of difficulty; but to entitle such salvors to reward, it must be shown that they possessed skill commensurate with their vocation and condition in life, and adequate to the duties they undertook to perform.

Where the services have been performed by pilots, care should be taken to ascertain that the services were really of a salvage nature, and that the vessel was actually in distress; for otherwise they must be rewarded merely as pilotage. The rate of remuneration to pilots has, under the provisions of the Pilot Acts, been fixed on a liberal scale, and in return they are bound to afford their assistance in all weathers, except at the risk of their lives. It is, however, a settled doctrine of the Court of Admiralty, that pilots may claim as salvors in circumstances of great danger, or where other than mere pilotage services have been required of them. No pilot is bound to take charge of a vessel in distress for mere pilotage reward, and if he do take charge of a vessel so circumstanced, he is entitled to a salvage remuneration. In all such cases, the skill and knowledge possessed by persons of this class fairly entitle them to a liberal reward."

See, further, the judgments of Dr. Lushington in *The Otto Hermann*, *The Albert*, *The Ella Constance*, 33 L. J., P. M. & A. 189, 191.

(*h*) See *L'Espérance*, 1 Dods. 46; and the judgments in *The Fortuna*, 4 Rob.

194; and *The Blendenhall*, 1 Dods. 421; also *The Elliotta*, 2 Dods. 75; *The Charlotta*, 2 Hagg. 366; *The Effort*, 3 Hagg. 165; *The Watt*, 2 W. Rob. 70; *The Rasche*, L. R., 4 A. & E. 127; *The Craigs*, 5 P. D. 186; and *The Sarah Bell*, 4 Notes of Cases, 146, and the judgment in *The Inca*, *nomine Gore v. Bethel*, 12 Moo. P. C. C. 189; Swa. 370. The reason why a higher reward is usually given where the ship or goods are derelict is that these are cases of great danger to the property saved. See the judgment of Dr. Lushington in *The Florence*, 16 Jur. 578. In order to constitute derelict, it is not necessary that no owner should afterwards appear; it is sufficient that there has been an abandonment at sea by the master and crew without hope of recovery. A mere quitting of the ship, however, in consequence of imminent danger, or for the purpose of procuring assistance from the shore, or with an intention of returning to her again, is not an abandonment. See the judgment of Lord Stowell in *The Aquila*, 1 Rob. 40; *The Cosmopolitan*, 6 Notes of Cases, Suppl. 26; *The Barefoot*, 14 Jur. 841; *The Pickwick*, 16 Jur. 669; *The Fenix*, Swa. 13.

(*i*) See *The Amérique*, L. R., 6 P. C. 468; *The Aquila*, 1 Rob. 37; *The Fortuna*, 4 Rob. 78; and the judgments in *The Effort*, 3 Hagg. 165, and *L'Espérance*, 3 Hagg. 165; *The Thetis*, 2 Knapp, P. C. 410; *The Scindia*, L. R., 1 P. C. 241; and *The True Blue*, L. R., 1 P. C. 251. In *The Frances Mary*, 2 Hagg. 89, and *The Reliance*, *ib.* 90, note, the Court gave a moiety, and ordered that the costs should be paid out of the other moiety. In America it is held, that there is no reason for fixing the reward for salving derelict property at not more than a half, or less than a third, of the property saved, and that the true principle in all cases is to give an adequate reward according to the circumstances of the case. *Post v. Jones*, 19 How. (American) Rep. 150.

(*k*) See the judgment in *The Britannia*, 3 Hagg. 164.

(*l*) *The Jonge Bastiaan*, 5 Rob. 322.

machinery (*m*), a larger proportion than a moiety has been allowed. But these cases have been either cases of derelict, or cases of a very peculiar nature; and it has been laid down, that in no case, however meritorious the service may have been, does the Court of Admiralty decree to the salvors more than a moiety of the proceeds of the property saved (*n*). The amount commonly allowed has been one third or one quarter of the net proceeds of the property saved, whilst in some cases a fifth, sixth, or tenth only, has been awarded (*o*). And where the service has been of a very trivial nature, or performed with very little risk or labour, even less has been given (*p*). The use by the salvors of steam power has often been recognized by the Court as a ground for awarding high salvage, since this power is expensive to the owners of the salving ship, and usually very efficacious to the ship in distress (*q*). The Court usually gives a smaller proportion of the value of the property saved where the value is large, and a higher proportion where it is small; for in the latter case the award of a small proportion would not hold out a sufficient encouragement to salvors (*r*).

Reluctance
of Court of
Appeal to deal
with amount
of award.

It is a settled rule that the Court of Appeal will not interfere with the amount of salvage awarded by the Court below, unless the judgment appears to be clearly erroneous, or the case is of an extraordinary character (*s*).

(*m*) *The Jubilee*, 3 Hagg. 43, note.

(*n*) *Gore v. Bethel*, 12 Moo. P. C. C. 189; *The Amérique*, L. R., 6 P. C. 468.

(*o*) For the proportions of salvage awarded in particular cases, see Pritchard's Admiralty Digest, tit. Salvage.

(*p*) *The Red Rover*, 3 W. Rob. 150. See also *The Inca*, Swa. 370.

(*q*) *The Raikes*, 1 Hagg. 246; *The London Merchant*, 3 Hagg. 394; *The Earl Grey*, *ib.* 363; *The Shannon*, 11 Jur. 1046; *The Martin Luther*, Swa. 287; *The Spirit of the Age*, *ib.* 286; *The Norden*, 1 Spks. 185; *The Kingalock*, *ib.* 267. In the instructions by the Board of Trade to the receivers of wreck, it is said (in Article 95), that, "when the services have been rendered by steam vessels, they are always considered as entitled to a very liberal reward, not only on account of the great value of the property which is thereby exposed to risk, but because of the great skill and power of vessels of that description, and the expedition with which services are generally performed by them."

(*r*) See the judgments of Lord Stowell

in *The Blendenhall*, 1 Dods. 421, and in *The Waterloo*, 2 Dods. 442. See also *The Amérique*, L. R., 6 P. C. 468.

(*s*) *The Clarisse*, *nomine Gann v. Brun*, 12 Moo. P. C. C. 340; Swa. 129; and *The Neptune*, *nomine Green v. Bailey*, 12 Moo. P. C. C. 346. For cases in which the Privy Council has declined to interfere see *The Clarisse*, Swa. 219; *The Neptune*, 12 Moo. P. C. C. 346; *The Carrier Dove*, 2 Moo. P. C., N. S. 243; *The Fusilier*, 3 *ib.* 269; Br. & L. 341; and *The England*, L. R., 2 P. C. 253.

For instances to the contrary see *The Thetis*, 2 Knapp, 390; *The Scindia*, L. R., 1 P. C. 241; *The Tyus Blue*, L. R., 1 P. C. 250; and *The Glenduror*, L. R., 3 P. C. 589, in which the amount was increased; *The Inca*, 12 Moo. P. C. 189; Swa. 370; *The Chetah*, 5 Moo. P. C., N. S. 178; L. R., 2 P. C. 208; and *The Amérique*, L. R., 6 P. C. 468, in which it was reduced. See also *The Medina*, 2 P. D. 5; *The City of Berlin*, *ib.* 187; *The Mabel*, C. A., March 22, 1881, cases decided in the

The Court of Admiralty has always exercised the right of apportioning salvage where there has been more than one claimant. The Merchant Shipping Act, 1854, contained an express provision in this respect, and provided, by sect. 498, that whenever the aggregate amount of salvage payable in respect of salvage services rendered in the United Kingdom had been finally ascertained, and exceeded 200*l.*, and whenever the services had been rendered elsewhere, and the amount had been finally ascertained, whatever it might be, if any delay or dispute arose as to the apportionment, any Court having Admiralty jurisdiction might cause it to be apportioned amongst the persons entitled, in such manner as it might think just; and might for that purpose appoint a person to carry the apportionment into effect, and compel any person in whose hands or under whose control the amount might be, to distribute it, or bring it into Court, to be dealt with as the Court might direct (*l*).

Jurisdiction of Admiralty Division and other Courts of Admiralty jurisdiction to apportion salvage.

Court of Appeal since the Judicature Acts.

On appeals in salvage cases to the Privy Council fresh evidence was rarely admitted. The Court would usually only hear the appeal on the evidence which was before the Court below. *The Scindia*, L. R., 1 P. C. 241.

(*l*) The Court of Admiralty, in exercising the jurisdiction given to it by these provisions, will decree an equitable apportionment, unless an equitable agreement be proved, or an equitable tender has been made. *The Enchantress*, Lush. 93; *The Princess Helena*, *ib.* 190; *The Golondrina*, L. R., 1 A. & E. 339; *The Afrika*, 5 P. D. 192; and *supra*, p. 649. In the more recent cases of salvage by steam-ships tried in the Admiralty Division the proportion of the award allotted to the owners has usually been two-thirds. No action could be brought at common law to enforce an apportionment of salvage. *Atkinson v. Woodhall*, 31 L. J., M. C. 174; 1 H. & C. 170.

An appeal lies to the Court of Appeal from the Admiralty Court from the apportionment of salvage by the Admiralty Division. *The Chetah*, L. R., 2 P. C. 206; *The Glenduror*, L. R., 3 P. C. 589. The Court, however, will only interfere in matters of discretion of this kind under very strong circumstances. *The Clarissa*, 12 Moo. P. C. 340; *The Neptune*, *ib.* 348; *The England*, L. R., 2 P. C. 253.

The following are the instructions issued by the Board of Trade to receivers

of wreck, with reference to the apportionment of salvage. See Article 97 of the Instructions issued in 1865.

"The principles which regulate the apportionment of a salvage reward amongst the parties entitled thereto are, in most cases, comparatively simple. The cases which will fall within the cognizance of the receivers will generally be found to belong to one or other of the following classes. Where the salvage services have been rendered:—

- (a) By revenue cruisers or coast-guard men.
- (b) By smacksmen, boatmen, or fishermen.
- (c) By landsmen or beachmen.
- (d) By the master and crew of some vessel.

(a) As regards the first class of salvors, the revenue cruisers and coast-guard men, rules have been laid down for the distribution of rewards of all kinds amongst the officers and men engaged; and the receivers should therefore pay over the whole amount due to the officers and men to the inspecting commander of the district, who will distribute the same under the authority of the comptroller-general of the coast-guard. A special report should be made by the inspecting commander in cases where special skill or enterprise have been shown, or special risk incurred by any individual, in order that directions may be issued, if necessary, for giving a special reward.

- (b) With regard to the second class

County
Courts having
Admiralty
jurisdiction.

A County Court having Admiralty jurisdiction, has jurisdiction to apportion salvage within the limited jurisdiction over claims for salvage given by the County Courts Admiralty Jurisdiction Act, 1868 (*u*).

of salvors, the smacksmen, boatmen and fishermen, it will generally be found that there is a scale of distribution recognized and agreed upon amongst them; the smack or boat has a certain number of shares, and the remainder belong to the master and crew in certain agreed proportions. Where such a scale exists it should be strictly adhered to in making an apportionment of salvage; unless, indeed, any one or more of the men have shown great skill and enterprise, or incurred greater risk than the others, when an exception may sometimes be made in their favour.

Where, however, salvage has been awarded to the crew of a smack or boat, amongst whom there is no such agreed scale of distribution, the receivers will do well, in making the apportionment, to follow the scale of distribution generally adopted amongst the smacksmen and boatmen in the neighbourhood, as such agreements are generally found to be based upon principles of justice and equity, and are such as best conduce to the interests of the community by whom they have been adopted.

Where a cargo of fish has been spoiled or injured in rendering the salvage service, care should be taken in making the apportionment, to ascertain upon whom the loss will fall, and a corresponding allowance should be made to them.

(c) With regard to the third kind of salvors, beachmen and landmen, it will generally be proper to divide the salvage equally amongst them all. They will, probably, in most instances, be found to belong to the same class in life, to have incurred the same risk and the same amount of labour, and to have shown the same skill in the performance of the services. Should any of them have, however, greatly distinguished themselves, it will be proper to give them a larger proportion of the salvage award.

(d) The fourth class of cases, where the salvage services have been rendered by a vessel and her master and crew, will be found by the receivers to be the most difficult, as the apportionment must depend upon a consideration of the whole circumstances of the case, and whether the preservation of the property is due principally to the services of the salving vessel herself, or to the personal exertions and risk incurred

by the master or the crew. As a general rule it may be stated, that where the services have been chiefly performed by the vessel herself, as in the case of a derelict, where the property has been towed into a place of safety, one half of the salvage reward is given to the owners of the salving vessel, from one fourth to one eighth to the master, and the remainder amongst the crew in proportion to their wages. This is the scale of distribution usually adopted, where the salvage services have been performed by steamers, and where it may generally be said that success is due chiefly to the power and construction of the vessel herself. Where, however, the principal part of the services has not been rendered by the vessel, and where the vessel has not been exposed to any risk or danger, but where the preservation of the property is due in great measure to the personal exertions of the master and crew, then a much smaller portion of the salvage is awarded to the owners of the vessel. It is, however, a question of appreciation, dependent entirely upon the circumstances of each particular case, and in regard to which no positive general rule can be laid down. The greater the risk to the master and crew and the less the risk to the vessel, the greater must be the proportion awarded to the actual salvors, and the less to the owners of the salving vessel.

Finally, it should be observed that apprentices are entitled to share in an allotment of salvage; and that the master or the owners of the vessel cannot claim the shares which may fall due to their apprentices; and also, that if a contract giving up or making over any claim to salvage to any person whatever is made by any seaman or apprentice prior to the accruing of such claim, such contract is absolutely void, as being against equity, public policy, and positive enactment. See the M. S. Act, 1854, ss. 182 and 233. If, however, a vessel is specially engaged for salvage services, and it appears by the terms of the agreement made with the crew that the ship is to be employed on salvage service, then the crew are only entitled to the remuneration specified in the agreement. See the M. S. Act, 1862, s. 18, and *supra*.

(*u*) *The Glennibanta*, 2 P. D. 45.

By sects. 466 and 467 of the Merchant Shipping Act, 1854, it was provided that whenever the amount of salvage payable in respect of salvage services rendered in the United Kingdom had been finally ascertained by agreement or the award of justices, but a dispute arose as to the apportionment of it amongst several claimants, the person liable to pay the salvage might (if the amount did not exceed 200*l.*) pay it over to the receiver of wreck of the district; and upon the receipt of the money, and the granting of a certificate of the payment by the receiver, the person liable to pay the salvage was discharged as well as his property in respect of the claim in question; and the amount so paid to the receiver might be distributed by him as he thought fit (*x*). These provisions must now be read together with the provisions of sect. 49 of the Merchant Shipping Act, 1862, which have been already mentioned (*y*).

Apportionment by receivers of wreck.

Where salvors have acted negligently or unskilfully, although their services have been on the whole meritorious, or where they have misconducted themselves by making extortionate demands or otherwise, the Court of Admiralty has awarded to them a smaller amount of salvage than would otherwise have been given (*z*). And in some cases in which the salvors have improperly interfered and resisted the authority of the owners of the vessel in distress, or have been guilty of wilful or criminal misconduct (*a*), or there has been great negligence and delay on their part (*b*), or the means adopted have been improper (*c*), or where they have themselves placed in jeopardy the property salvaged (*d*), or have waived their rights to salvage (*e*), the Court has refused to award any salvage whatever.

Effect of misconduct or negligence of salvors, or of waiver of salvage.

(*x*) As to the principles upon which the receivers act in making the apportionment, see *supra*, p. 663, note (*l*).

(*y*) *Ante*, p. 657.

(*z*) *The John and Thomas*, 1 Hagg. 157, note; *The Dantzic Packet*, 3 Hagg. 383; *The Black Boy*, *ib.* 386, note; *The Glasgow Packet*, 2 W. Rob. 306; *The Dossetti*, 10 Jur. 865; *The Cape Packet*, 3 W. Rob. 122; *The Charles Adolphe*, Swa. 153; *The Atlas*, Lush. 518.

(*a*) *The Barefoot*, 14 Jur. 841; *The Lady Worsley*, 2 Spks. 253; *The Wear Packet*, 2 Spks. 256; *The Florence*, 16 Jur. 574; *The Atlas*, *ubi supra*.

(*b*) *The City of Edinburgh*, 2 Hagg. 333.

(*c*) *The Neptune*, 1 W. Rob. 297;

The Duke of Manchester, 2 W. Rob. 470; *S. C.*, 6 Moo. P. C. C. 90. In this case, and in *The Barefoot*, 14 Jur. 841, the claims of the salvors were dismissed with costs.

(*d*) *The Glengaber*, L. R., 3 A. & E. 534; *The Cargo ex Capella*, L. R., 1 A. & E. 156; *The C. S. Butler*, L. R., 4 A. & E. 178. See also the judgment of Sir Robert Phillimore in *The Thetis*, L. R., 2 A. & E. 365; and *The Clara*, 23 Wallace, 119.

(*e*) *The Jonge Bastiaan*, 5 Rob. 322; *The Kileena*, 6 P. D.; where salvors in possession of a derelict abandoned her before she was brought into safety, and allowed the salvage service to be completed by other salvors.

Where in a case before the Judicature Acts a steamer whilst rendering salvage services to a barque negligently came into collision with her, it was held that this did not deprive her of her right to salvage, but that she was liable in a cross suit for the damage done in the collision (*d*).

Statutory
forfeiture
of salvage.

It is provided by sect. 450 of the Merchant Shipping Act, 1854, that the finder of any wreck (*e*), who does not comply with the provisions of the act as to giving notice of it, or delivering it up to the receiver of wreck of the district, shall forfeit all claim to salvage.

Allotment to
part of crew
not actually
engaged.

Where some only of the crew of a ship are actually engaged in the salvage service those who remain on board the salving vessel are usually entitled to share in the salvage, provided they are also ready to encounter the peril (*f*). A distinction in amount, however, is usually made in favour of those who are actually engaged in the service (*g*). Where part of the crew of a light ship assisted in rendering a salvage service, the Court refused to award any part of the salvage to those of the crew who remained on board (*h*). Where two vessels come up together and render assistance to a ship in distress, all of both crews are entitled to be considered as salvors, although a part only is actually employed (*i*).

To owners of
boats, &c.

The claim of the owners of salving vessels, who do not personally assist in the service, to share in the salvage, was formerly considered as very slight. It was otherwise, however, if their property was exposed to considerable danger, or diverted from a lucrative employment, or if they incurred a real loss or inconvenience (*j*). So, those who furnished boats, or other articles, for

(*d*) *The C. S. Butler, The Baltic*, L. R., 4 A. & E. 178.

(*e*) A barge adrift in a navigable river is not "wreck" within this section, and should be restored to its owner. *The Zeta*, L. R., 4 A. & E. 460.

(*f*) *The Baltimore*, 2 Dods. 132; *The Charlotte Wylic*, 2 W. Rob. 495; *The Charles*, L. R., 3 A. & E. 536; *The Skibladner*, 3 P. D. 24. See also *The Sir Ralph Abercrombie*, L. R., 1 P. C. 454.

(*g*) See *The Jane*, 2 Hagg. 338; *The Sarah Jane*, 2 W. Rob. 110.

(*h*) *The Emma*, 3 W. Rob. 151.

(*i*) *The Mountaineer*, 2 W. Rob. 7.

(*j*) See the judgment in *The Jane*, 2 Hagg. 343; *The Waterloo*, 2 Dods. 433; *The Vine*, 2 Hagg. 1; *The Salacia*, *ib.* 262; *The Martha*, 3 Hagg. 436;

The Louisa, 3 W. Rob. 99. In apportioning salvage, the Court formerly considered every vessel as uninsured, and would not award a larger amount to the owners, although by rendering the service they incurred a risk of forfeiting a policy of insurance on their ship. *The Deceron*, 1 W. Rob. 180. But in more recent times it has been held that the claim of owners are to be considered—

1. By reason of the possibility of the vitiation of the policy of insurance;
2. By reason of their liability to the owners of the cargo through their deviation;
3. By reason of the risk to which their property has been exposed in rendering the service:

salvage service, but did not assist in person, were not usually entitled to be paid salvage, but only a fair remuneration for the use of the articles which they had supplied (*k*). In more recent times the claims of the shipowners to salvage have received greater consideration, and it has become the practice, especially in cases where steam vessels have been engaged, to allot a liberal share of the salvage to their owners (*l*).

Where several independent parties co-operate in assisting a vessel, the Court awards salvage according to the merit of the respective claims. Where the first salvors had incurred considerable danger, and their conduct had been meritorious, the Court allotted to them a large share of the salvage, although their efforts had produced no important result before the arrival of the other assistance (*m*). To first salvors.

The Court of Admiralty has always been jealous in maintaining the rights of original salvors (*n*). It requires persons who disturb their possession to show clearly that a necessity for their interference existed, or that their services were adopted (*o*). The first salvors are not, however, justified in resisting the master's authority, or in attempting to exclude further assistance where it is necessary (*p*). For, except in cases of derelict, where the first occupant has a right of exclusive possession if he can alone save the property, salvors act only under the sufferance and permission of the master, or other person in command of the vessel in distress (*q*).

It is provided by sect. 20 of the Merchant Shipping Act, 1855, that where services are rendered by officers or men of the coast-guard service in watching or protecting shipwrecked property, they are to be remunerated by the owners according to a scale to be fixed by the Board of Trade, unless the services have Remuneration for services by coast guard.

See *The Sir Ralph Abercrombie*, L. R., 1 P. C. 454, and *supra*, pp. 660, 662.

The duty imposed on a vessel of standing by after a collision does not affect the right to salvage for any salvage service she may then perform. *The Queen*, L. R., 2 A. & E. 53.

(*k*) *The Vine*, 2 Hagg. 1; *The Charlotte*, 3 W. Rob. 68.

(*l*) See *The Cleopatra*, 3 P. D. 145, and *supra*, p. 662, note (*g*). See also p. 663, n. (*h*).

(*m*) *The Genesee*, 12 Jur. 401.

(*n*) See the judgments in *The Char-*

lotta, 2 Hagg. 364; *The Glory*, 14 Jur. 678; *The Pickwick*, 16 Jur. 670; *The Effort*, 3 Hagg. 165; and *The Glasgow Packet*, 2 W. Rob. 313. See also *The Fleece*, 3 W. Rob. 278.

(*o*) *The Bledenhall*, 1 Doda. 416; *The Maria Law*, Edw. 177; *The Charlotte*, 2 Hagg. 361; and *The Eugene*, 3 Hagg. 160.

(*p*) *The Dantzic Packet*, 3 Hagg. 383; *The Glory*, *ubi supra*.

(*q*) See the judgment in *The Dantzic Packet*, *ubi supra*, and *The Kathleen*, L. R., 4 A. & E. 277.

been declined, or salvage has been claimed and awarded in respect of them (*q*).

**SALVAGE
WITHIN THE
BOUNDARIES
OF THE CINQUE
PORTS.**

In cases of salvage arising within the jurisdiction of the Cinque Ports (*r*), the salvors may take proceedings, as in cases of salvage occurring elsewhere, either in the Admiralty Division or in a County Court having Admiralty jurisdiction (*s*), or, at their option, either in the Court of Admiralty of the Cinque Ports, or before the Salvage Commissioners of the Cinque Ports (*t*).

**Jurisdiction
of the Court
of Admiralty
of the Cinque
Ports.**

The Court of Admiralty of the Cinque Ports from ancient times, by virtue of royal charters or prescription, exercised an original instance jurisdiction in civil or maritime causes arising within the boundaries of the Cinque Ports (*u*). The jurisdiction so exercised was preserved or recognized in the earlier statutes relating to Merchant Shipping and Admiralty Jurisdiction (*x*), and the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), which repealed all laws, statutes, and usages, and all royal and other charters, grants, and letters patent granted to any borough or body corporate, whereby such borough or body corporate, or the inhabitants of the same, claimed to be exempted from the jurisdiction of the High Court of Admiralty of England, expressly provided that nothing therein contained should extend to alter or affect the jurisdiction of the Lord Warden of the

(*q*) The scale is not to exceed any scale by which payment to officers and men of the coastguard for extra duties in the ordinary service of the Board of Customs is for the time being regulated; the M. S. Act, 1856, s. 20.

(*r*) The Cinque Ports are Dover, Sandwich, Romney, Hastings, and Hythe; the two ancient towns are Winchelsea and Rye.

(*s*) Where proceedings in such cases are taken in a County Court having Admiralty jurisdiction, they may be appealed, or transferred, to the Court of Admiralty of the Cinque Ports, instead of to the Admiralty Division. 31 & 32 Vict. c. 71, s. 33 (Appendix, p. ccxii).

(*t*) *The Maria Luisa*, Swa. 67; *The Jeune Paul*, L. R., 1 A. & E. 336.

(*u*) See 2 Inst. 556, 4 Inst. 222; Jeake's Charters of the Cinque Ports, ed. 1728, pp. 24, 67; *Stock v. Cullen*, T. Jones, 66, 67; *Stock v. Deneur*, Ch. Cas. 305; 2 Brown's Admiralty Law, p. 498. See also Wynne's Life of Sir Leoline

Jenkins, vol. 1, pp. 85—88, vol. 2, p. 782; Knockner's Grand Court of Shepway, pp. xiii—xvi, 129—152, and articles of Mr. Knockner in the Sussex Archaeological Transactions for 1874, vol. xxxi., and by Sir Travers Twiss in the Nautical Magazine for June, 1877, p. 571, and the cases cited *supra*, note (*t*). Appeals from the Court of Admiralty of the Cinque Ports lie to the Judicial Committee of the Privy Council. *The Clariase*, Swa. 129; *The Lord Warden and Admiral of the Cinque Ports v. His Majesty in his Office of Admiralty*, 2 Hagg. 438, at p. 446. As to the boundaries of the Admiralty jurisdiction of the Cinque Ports, see Knockner's Grand Court of Shepway, p. 144, and the 1 & 2 Geo. 4, c. 76, s. 18; Supplementary Appendix, p. 130.

(*x*) See 4 Geo. 1, c. 12, s. 2; 26 Geo. 2, c. 19, s. 10; 49 Geo. 3, c. 122, s. 26; 53 Geo. 3, c. 87, s. 1; 53 Geo. 3, c. 140, s. 8; 1 & 2 Geo. 4, c. 75, s. 24, and 1 & 2 Geo. 4, c. 76, s. 16. See also 27 Hen. 8, c. 4; 28 Hen. 8, c. 15; 5 Eliz. c. 5, and 11 & 12 Will. 3, c. 7.

Cinque Ports in his office of admiral of the Cinque Ports, and that all suits and matters wherein before the passing of that act the rights of any salvors, or any droits, or perquisites to the office of admiral belonging were drawn into question might be continued, heard, determined, and adjudicated upon in like manner as if that act had not passed (*y*). So also the rights and jurisdiction of the Lord Warden of the Cinque Ports were expressly reserved by the Wreck and Salvage Act, 1846 (*z*), which remained in force till the coming into operation of the Merchant Shipping Act, 1854; and, as we have already seen, it is provided by sect. 460 of the last-mentioned act, that disputes arising within the boundaries of the Cinque Ports shall be determined in the same manner as before the passing of such last-mentioned act. This last provision is unaltered by the provisions of the Merchant Shipping Act, 1862, s. 49, and consequently whatever instance jurisdiction in salvage cases the Court of Admiralty of the Cinque Ports ever possessed can still be exercised by it (*a*).

The effect of the 460th section of the Merchant Shipping Act, 1854, is also to preserve the jurisdiction conferred by the 1 & 2 Geo. 4, c. 75, on the Salvage Commissioners of the Cinque Ports, appointed under that act, or the 9 Geo. 4, c. 37 (*b*). The first of these acts empowers the Lord Warden of the Cinque Ports to nominate under his hand and seal three or more commissioners in each of the Cinque Ports, two ancient towns, and their members, to adjust differences relating to salvage which may arise between the masters of vessels and persons bringing cables and anchors ashore. Where vessels are forced or cut from

Of the
Salvage Com-
missioners of
the Cinque
Ports.

(*y*) Sect. 108. Among the Courts abolished by this section were the Admiralty Courts of the boroughs of Great Yarmouth; Dunwick in the county of Suffolk; King's Lynn; Southampton and Southwold. See 1 & 2 Geo. 4, c. 75, s. 24. As to the Admiralty Court of Great Yarmouth, see *In the Matter of a Raft of Timber*, 2 W. Rob. 251, 254, note.

(*z*) 9 & 10 Vict. c. 99, s. 43. This act was repealed by the Merchant Shipping Act Repeal Act, 1854 (17 & 18 Vict. c. 120), Appendix, pp. clxv, clxx. The jurisdiction of the lord warden, in relation to civil suits and proceedings, was abolished by the 18 & 19 Vict. c. 48, and the 20 & 21 Vict. c. 1, but these statutes did not interfere

either with the jurisdiction of the lord warden and his officers, relating to the adjustment of salvage, and in respect of flotsam, jetsam, and lagan, or the jurisdiction of the Court of Admiralty of the Cinque Ports. See s. 10 of the 18 & 19 Vict. c. 48.

(*a*) See *The Maria Luisa*, Swa. 67, and *supra*, p. 654; *The Jeune Paul*, L. R., 1 A. & E. 336.

(*b*) The latter of these acts extends to the deputy warden the powers given by the former act to the warden. The extent of the jurisdiction of the Cinque Ports, for the purposes of the act, is defined by s. 18 of the 1 & 2 Geo. 4, c. 76. See Supplementary Appendix, p. 130.

their cables and anchors by any accident, and leave the same in any place within the jurisdiction of the Cinque Ports, two ancient towns, or their members, the commissioners are to determine any salvage claim within twenty-four hours after it is referred to them (c). They have power also, if the master or owner of the ship or goods or his agent is present at the place where they are sitting, to decide upon all claims made by pilots, boatmen, or others, for services of any sort rendered to any ship, either by carrying off to her anchors, cables, or stores, from any part of the coast within the jurisdiction, or by conducting her to any place within the jurisdiction, and upon all claims for the saving, within the jurisdiction, of any goods which are wrecked, stranded, or cast away from any ship; and they may decide on such claims for services rendered to shipping, whether the ships were in distress or not (d). The commissioners can act only in the ports or places in which they are resident, or from which their usual place of residence is not distant more than a mile (e).

Appeal.

Persons who are dissatisfied with the decision of the commissioners may, within eight days after the award is made, but not afterwards, declare to the commissioners their desire to appeal. The appeal may be either to the Court of Admiralty of the Cinque Ports, or to the High Court of Admiralty, and the decision of either of these Courts is final (f). The appellant must, within twenty days from the date of the award, take out a monition against the adverse party; and the commissioners are bound to release the ship, cargo, or goods, upon bail being given by the owners or their agents in double the amount of the sum awarded (g).

SALVAGE
WITHIN THE
JURISDICTION

The provisions of the Merchant Shipping Acts, 1854 and 1862, relating to the remedies for the recovery of salvage in

(c) 1 & 2 Geo. 4, c. 76, s. 1. Supplementary Appendix, pp. 127, 128.

(d) *Ib.* s. 2.

(e) *Ib.* s. 3.

(f) *Ib.* ss. 4 and 5. As to the admission of fresh evidence on such an appeal, see *The Annette*, 4 L. R., A. & E. 9.

(g) 1 & 2 Geo. 4, c. 76, s. 4. The Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120), repealed the 1 & 2 Geo. 4, c. 76, except ss. 1, 2, 3, 4, 5, 15, 16, and 18. The 16th section of the act provides that nothing in the

act contained shall extend to the taking away, abridging, prejudicing, or impeaching in any manner whatever the jurisdiction of the High Court of Admiralty of England or the Admiralty Court of the Cinque Ports. The magistrates or county court judges acting under the M. S. Act, 1854, s. 460, or the M. S. Act, 1862, s. 49, have apparently no jurisdiction over cases of salvage arising within the Cinque Ports. See the M. S. Act, 1854, s. 460, *supra*, p. 654; and 9 & 10 Vict. c. 97, s. 43.

Ireland and Scotland, and to the jurisdiction in cases of salvage of the Court of Admiralty in Ireland, and the Court of Session in Scotland, have been already noticed (*h*). With regard to the jurisdiction of the former Court, it is moreover provided by sect. 27 of the 30 & 31 Vict. c. 114, that, subject to the provisions of the Merchant Shipping Acts, 1854 and 1862, the Court of Admiralty in Ireland shall have jurisdiction to decide upon all claims whatsoever relating to salvage, and to enforce the payment thereof whether the services in respect of which salvage is claimed were performed upon the high seas or within the body of any county, or partly in the one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land (*i*).

OF THE SCOTCH
AND IRISH
COURTS AND
THE COLONIAL
VICE-ADMIRALTY.

By the Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24), sect. 10, jurisdiction is given to the Colonial Vice-Admiralty Courts established under that act in all cases of claims in respect of salvage of any ship, or of life or goods therefrom (*j*).

There is a peculiar obligation on Queen's ships to assist merchant vessels in distress (*k*); yet when salvage services were rendered by a ship of war to a merchant vessel, it was always considered, when claims in respect of such services came before the Court of Admiralty, that, apart from any legislative enactment, the officers and crew of the salving ship were entitled to reward in the same manner as other salvors (*l*). Where, however, the assistance given was merely incidental to the general duty of Government vessels, as where the commander of a sloop

SALVAGE BY
QUEEN'S
SHIPS.

(*h*) *Supra*, pp. 643, 654, 656, n. (c), 657; and as to the maritime jurisdiction of the Court of Session and the Sheriffs' Court in Scotland, see further 11 Geo. 4 & 1 Will. 4, c. 69, ss. 21, 22; and *Duncan v. The Dundee, Perth and London Shipping Co.*, 5 Sees. Ca. (4th Series) 762.

(*i*) Certain local courts in Ireland have a limited Admiralty jurisdiction in cases of salvage. See 39 & 40 Vict. c. 28, s. 3; 40 & 41 Vict. c. 56, s. 49.

(*j*) See Appendix, p. cxxl. The inherent jurisdiction of the Vice-Admiralty Courts abroad, and of the Admiralty Division, is concurrent. See *The Peerless*, Lush. 30, and *supra*, p. 123, n. (x). As to the jurisdiction of the former Courts to enforce salvage bonds and agreements made in cases where the salvors have abandoned their

lien for salvage, see *supra*, pp. 672—674.

(*k*) See the judgments of Lord Stowell in *The Mary Ann*, 1 Hagg. 158; and of Sir J. Nicholl in *The Clifton*, 3 Hagg. 121. By an order of the Commissioners of the Admiralty, issued on the 30th January, 1852, officers of Queen's ships were directed not to make any claim for salvage services rendered to vessels in distress unless the service had been really important or accompanied with hazard.

(*l*) See *The Louisa*, 1 Dods. 317; *The Mary Ann*, 1 Hagg. 158; *The Thetis*, 3 Hagg. 14; 2 Knapp P. C. 390; *The Lustre*, 3 Hagg. 154; *The Ewell Grove*, *ib.* 209; the judgment in *The Rapid*, *ib.* 421; *The Wilsons*, 1 W. Rob. 172; *The Earl of Eglinton*, Swa. 7; and *The Alma*, Lush. 378; *The Cargo ex Woonung*, 1 P. D. 260.

of war, acting under the directions of a vice-consul, rescued a convict ship from the mutinous crew and convicts on board, no salvage was allowed (*m*). Provisions respecting claims for salvage services rendered by Queen's ships were, however, made by the 16 & 17 Vict. c. 131. This act is now repealed (*n*), and the existing statutory regulations on this subject are to be found in the Merchant Shipping Act, 1854.

Sect. 484 of this act provides, that in cases where salvage services are rendered by any ship belonging to the Queen, or by the commander, or crew, no claim is to be made or allowed for any loss, damage, or risk thereby caused to the ship, or stores, tackle, or furniture, or for the use of any stores, or other articles belonging to the Queen, supplied in order to effect these services, or for any other expense or loss sustained by the Queen by reason of the services (*o*). By sect. 485, no claim on account of any salvage services rendered to any ship, cargo, or appurtenances by the commander or crew of any of the Queen's ships is to be finally adjudicated upon unless the consent of the Admiralty has first been obtained; and if any person who has originated proceedings in respect of such a claim fails to prove this consent, the suit is to be dismissed with costs (*p*).

Proceedings
when services
rendered
abroad.

It is provided by sect. 486, that whenever salvage services have been rendered to any ship or cargo at a place out of the United Kingdom and the four adjoining seas by the commander or crew of a Queen's ship, the salvors may, if justified by the circumstances in detaining the property at all, cause it to be taken to a port where there is a consular officer, or a Vice-Admiralty Court (*q*). The salvor and the master or other person in charge of the property must each of them, within twenty-four hours after arriving at the port, deliver to the consular officer, or Vice-

(*m*) *The Francis and Eliza*, 2 Dods. 115.

(*n*) By the Merchant Shipping Repeal Act, 1854 (Appendix, p. clxv).

(*o*) A ship belonging to the Bombay government with a hired commander and crew was held to be in the same position as a Queen's ship. *The Cargo ex Woosung*, 1 P. D. 260; but a steam-tug belonging to the harbour of Ramsgate, and owned by the Board of Trade as the trustees of that harbour, is not within either sect. 484 or sect. 485. *The Cybele*, 2 P. D. 224; 3 P. D. 8.

(*p*) The consent is signified by writing under the hand of the Secretary to the Admiralty; and any document purporting to give the consent, and to be so signed, is *prima facie* evidence. The M. S. Act, 1854, s. 485. See *The Alma*, Lush. 378; *The Cargo ex Woosung*, 1 P. D. 260; *The Cybele*, 3 P. D. 8.

(*q*) For a list of the Vice-Admiralty Courts commissioned in 1879, see Appendix, pp. ccxlii, ccxliii. As to what is not a Queen's ship within this section, see *The Cybele*, *ubi supra*, and see *supra*, note (*o*).

Admiralty judge, a statement verified on oath respecting the property salvaged, and containing the particulars required by the act. By sect. 487, the consular officer or judge must, within four days after receiving these statements, fix the amount to be inserted in a salvage bond, to be given by the master according to the provisions of the act, to secure the payment of any salvage that may be awarded, which amount must not exceed half the value (according to his estimation) of the property in respect of which salvage is claimed. If either of the above statements is not delivered to the consular officer or judge in the required time, he may proceed *ex parte*, but he can in no case require the cargo to be unladen.

By sect. 488 of the statute, the right to detain the property ceases upon the due execution and delivery to the salvor of this bond.

Sect. 489 contains provisions for additional security in the case of ships owned by persons resident out of the Queen's dominions.

By sect. 490, the consular officer or judge must transmit the documents, and a notice of the sum he has fixed for the bond, to the Court of Admiralty of England, or to any Vice-Admiralty Court if the parties are willing that the bond shall be dealt with by such Vice-Admiralty Court (*r*). Sects. 491, 492 and 493 provide that these bonds shall bind the owners of the ship, freight, and cargo, and their heirs, executors, and administrators, and empower the Court of Admiralty and the Vice-Admiralty Courts to enforce them.

By sect. 494, any salvor who elects not to proceed under the act has no power to detain the property, but may proceed otherwise for the enforcement of his salvage claim as if the act had not been passed; and nothing in the act contained is to abridge or affect the rights of salvors, except in the cases provided for by it.

By sect. 497 of the Merchant Shipping Act, 1854, it is provided, that in all cases where salvage is claimed, whether by the commanders or crews of Queen's ships or of any other ships, the salvors may voluntarily agree to abandon their lien on the property salvaged, upon the master or other person in charge

Voluntary
agreements on
abandonment
of lien.

(*r*) All documents made in pursuance of this part of the statute are exempt from stamp duty. See s. 496.

of it entering into a written agreement, attested by two witnesses, to abide the decision of the Court of Admiralty or of any Vice-Admiralty Court, and giving security to such amount as may be agreed upon. This agreement binds the ship, cargo, freight, and their owners, and may be adjudicated upon and enforced in the same manner as the bonds already mentioned (*g*).

**TOWAGE.
Jurisdiction
of the Ad-
miralty
Division.**

The Court of Admiralty, from ancient times, appears to have exercised jurisdiction over claims for towage, in cases where the towage services were rendered on the high seas (*r*). This jurisdiction was extended by the 6th section of the 3 & 4 Vict. c. 65; and, by virtue of that section and of the provisions of the Judicature Acts, the Admiralty Division now has jurisdiction to decide all claims and demands in the nature of towage, and to enforce the payment thereof, whether the ship to which the towage has been rendered may have been within the body of a county or upon the high seas at the time when such services were rendered (*s*).

**Maritime
Lien.**

Towage confers a maritime lien; and this lien, if enforced within a reasonable time in an action of rem in the Admiralty Division, travels with the ship into whosoever hands she may come (*t*).

**County Courts
having Ad-
miralty juris-
diction.**

County Courts having admiralty jurisdiction possess jurisdiction as to any claim for towage where either the amount claimed does not exceed one hundred and fifty pounds or the parties have agreed by a memorandum, signed by them, their solicitors or agents, that the Court proceeded in shall have jurisdiction (*u*).

**Vice-Admi-
ralty Courts
abroad.**

It is provided by the 10th section of the Vice-Admiralty

(*g*) When an agreement of this kind is made, statements similar to those required in the case of bonds must be made by the salvors and the master or person in charge of the property salvaged. These statements need not, however, be on oath. The M. S. Act, 1854, s. 497. The agreements and statements must be transmitted as soon as practicable by the salvors to the Court which is to adjudicate on the agreement. *Id.*

(*r*) Williams & Bruce's Admiralty Practice, p. 152. As to what is included in a towage service, see *The Princess Alice*, 3 W. Rob. 138; *The Strathnaver*, 1 App. Cas. 63.

(*s*) Appendix, p. cccxiii. See *The Christiana*, 3 W. Rob. 276; 7 Moo. P.

C. C. 871; *The Martha*, Lush. 314; *The Lady Flora Hastings*, 3 W. Rob. 118.

(*t*) See *The Constancia*, 10 Jurist, 846; *The Benares*, 7 No. C. Suppl. liii., *The St. Lawrence*, 5 P. D. 253, where it was admitted, with the assent of the Court, that a person who had paid a claim for towage was entitled to be repaid the amount of such claim in priority to the claim of a bottomry bondholder who had made advances on bottomry previously to the date when the towage services were rendered.

(*u*) 31 & 32 Vict. c. 71, s. 3 (Appendix, p. cccviii). See *The Hjemslett*, 5 P. D. 227.

Courts Act, 1863, that the Vice-Admiralty Courts abroad shall have jurisdiction over claims in respect of towage (*x*).

The Court of Admiralty in Ireland has jurisdiction in all cases of towage, whether the service is performed within the body of a county or on the high seas (*y*).

Court of Admiralty in Ireland.

By the common law of England, if a ship was lost at sea, but the cargo or a portion of it came to land, the goods saved belonged to the Crown (*z*). The strictness of this prerogative was relaxed by very early charters and statutes, and the owners of shipwrecked goods were allowed to retain them if they could identify them (*a*). By later acts provision was also made for rewarding those persons by whose labour and enterprize shipwrecked property had been saved (*b*).

WRECK.
Common law rights as to.

The rights of the owners, the Crown, and other claimants to property that has been wrecked are now regulated by the Merchant Shipping Act, 1854, and the Merchant Shipping Act, 1862 (*c*), and by the first of these acts provision is made for the control of matters relating to wreck and the appointment of receivers of wreck.

Wreck under the Merchant Shipping Act, 1854, and the Merchant Shipping Act, 1862.

The Merchant Shipping Act, 1854, gives (by sect. 439) to the Board of Trade the general superintendence of all matters relating to wreck (*d*); and empowers the Board, with the consent of the Commissioners of the Treasury, to appoint any officer of Customs, of the coast-guard, or of Inland Revenue, or, when it

Control of Board of Trade over and appointment of receivers of wreck.

(*x*) 26 Vict. c. 24, s. 10 (Appendix p. cxl.); *The British Lion*, Stuart's V.-Adm. Rep. (Quebec) 114. As to these Courts, see *supra*, p. 123, note (*x*).

(*y*) 30 & 31 Vict. c. 114, s. 28.

(*z*) 1 Bl. Comm. 291 (by Coleridge). See also Doct. & Stud. Dial. 2, c. 51, where the harshness of this prerogative is complained of, and it is said, that there being in these cases "no cause of forfeiture, but rather a cause of sorrow and heaviness, the last seemeth to add sorrow upon sorrow."

(*a*) See 1 Bl. Comm. 291, where charters of Hen. 1 and Hen. 2, and Rich. 1 are cited; and the statutes 3 Edw. 1, c. 4; 4 Edw. 1, stat. 2, s. 2; and 27 Edw. 3, stat. 2, c. 13. See also Woolrych on the Law of Waters and Sewers, p. 11.

(*b*) See the 12 Anne, stat. 2, c. 18; the 26 Geo. 2, c. 19; the 49 Geo. 3,

c. 122; the 53 Geo. 3, c. 87; and the 1 & 2 Geo. 4, c. 75. All these acts were repealed by the 9 & 10 Vict. c. 99, which was repealed by the Merchant Shipping Repeal Act, 1854. Appendix, p. clxv.

(*c*) The act in force before the passing of the M. S. Act, 1854, was the 9 & 10 Vict. c. 99.

(*d*) By sect. 2 of the act, wreck is, if not inconsistent with the context or subject-matter, defined to include jetson, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water. As to the meaning of flotsam, lagan and jetsam, and of wreck at common law, see 2 Inst. 167, 560; *Sir R. Constable's case*, 5 Co. 106; *The Pauline*, 2 W. Rob. 358; *The King v. Two Casks of Tallow*, 3 Hagg. 294; *The King v. Forty-nine Casks of Brandy*, 3 Hagg. 257, and *infra*, p. 643, note (*j*).

appears to the Board to be more convenient, any other person, to be a receiver of wreck in any district.

Vesting of
office of re-
ceiver-
general of
Admiralty
droits in
Board of
Trade.

It is provided by the 10th section of the Merchant Shipping Repeal Act, 1854, that the then receiver-general of droits of Admiralty (*d*) should, as to all things to be done by him in virtue of his office, conform to all lawful directions given for that purpose by the Board of Trade; and that, on a vacancy occurring in his office, no successor should be appointed, but thereupon all powers and privileges vested in such receiver-general should be transferred to the Board of Trade (*e*).

By sect. 440 of the Merchant Shipping Act, 1854, no admiral, vice-admiral, or other person, under whatever denomination, exercising Admiralty jurisdiction, as such, by himself or his agents, may receive, take, or interfere with any wreck except in the cases provided by the act.

Duties of
receivers of
wreck in
matters of
wreck.

The statute defines in detail, the duties of receivers of wreck whenever any ship or boat is stranded or in distress on the sea-shore or any tidal water in the United Kingdom; and power is given to them to summon and require assistance in these cases to prevent plunder, and to use lands adjoining the coast for the purpose of rendering assistance to ships or boats in distress (*f*).

(*d*) Appendix, p. clxvi. As to what are droits of Admiralty, see *The Rebecca*, 1 Rob. 227; and the Order in Council of the 6th of March, 1605, printed in a note to the report in that case (1 Rob. 231, note a); *The King v. Property Derelict*, 1 Hagg. 383; *The Hercules*, 2 Dods. 373; *The Helen*, 1 Hagg. 142; and *The Panda*, 1 W. Rob. 423 (goods of pirates); *The Pauline*, 2 W. Rob. 358, and the other cases cited *supra*, p. 675, note (*d*). See also *The Little Joe*, Stuart's Adm. Reports, 394; *Stackpoole v. Reg.*, L. R. (Irish), 9 Eq. 619. Droits of Admiralty are, during the life of Her Majesty, to be carried to the credit of the the Consolidated Fund. 1 Vict. c. 2, s. 2; the M. S. Act, 1862, s. 53. As to what are droits of the Crown, see *In the Matter of a Raft of Russian Timber*, 5 Jurist, N. S. 1099.

(*e*) The 11th section of the Merchant Shipping Act Repeal Act, 1854 (Appendix, p. clxvi), provides that the receivers of Admiralty droits appointed under the 9 & 10 Vict. c. 99 (repealed by the Merchant Shipping Act Repeal Act, 1854), shall hold their offices only

during the pleasure of the Board of Trade; and that the sergeants of the Admiralty Court of the Cinque Ports and their officers shall exercise the powers given them by the same act of 9 & 10 Vict. c. 99, only during the pleasure and subject to the direction of the Board of Trade. The section further provides that all such receivers, sergeants and officers shall possess in their districts within which they have exercised their duties the same powers, rights and privileges, and perform the same duties, as the receivers of wreck appointed under the M. S. Act, 1854, except that they shall not be entitled to take command of ships in distress unless authorized to do so by the Board of Trade.

(*f*) See the M. S. Act, 1854, ss. 441 to 446. The duties of the receivers where salvage is claimed have been already noticed, see *supra*, p. 655. Receivers may, by s. 448, examine upon oath any person belonging to ships in distress; and copies of the examinations, which are to be taken down in writing, must be forwarded to the Board of Trade and to Lloyd's.

The act also lays down rules to be observed by persons finding or taking possession of wreck, and for protecting the rights of admirals, vice-admirals, lords of manors and others who are entitled to unclaimed wreck, and for the payment of fees and expenses to the receivers (*g*).

By sect. 450, no person who has found or taken possession of wreck, and who (if the owner) does not as soon as possible give notice to the receiver of the district according to the provisions of the act, or who (if not the owner) does not as soon as possible deliver the wreck to the receiver, can make any claim to salvage (*h*).

By sect. 471, if no owner establishes a claim to wreck found in the United Kingdom before a year from the date at which it has come into the receiver's possession, he must deliver it up to any admiral, vice-admiral, lord of the manor or other person

Unclaimed
wreck in the
United King-
dom.

The authorized form of these depositions in cases of wreck is printed in the Appendix, "Forms," No. 56, p. cccxxxvii. See the M. S. Act, 1854, s. 455, and Sched. Table V., Appendix, p. clxiv, as to the fees chargeable in respect of these examinations. The depositions are not evidence of facts which were not properly the subject of inquiry before the receiver. *Not-hard v. Pepper*, 17 C. B., N. S. 39. It was held in that case that the examination of the master of the plaintiff's ship taken by the receiver was not admissible as evidence for the defendant in an action of collision for the purpose of proving the fact that the damage from the plaintiff's ship from the collision was on her starboard bow; such fact being relied on for the purpose of showing that the plaintiff's ship was in fault,—the question which ship caused the damage to the other not being a matter which the receiver had power under s. 448 to examine into. See also *The Little Lizzie*, L. R., 3 A. & E. 56, where it was held that depositions taken by a receiver of wreck under the section were not admissible as evidence in a salvage suit for the purpose of proving the facts stated in the depositions. See also *The Henry Coron*, 3 P. D. 156, where a similar decision was come to though the depositions were tendered in evidence after the persons who had been examined were dead.

It is provided by the Contagious Diseases (Animals) Act, 1878, that where a carcass or part of the carcass

of any animal washed ashore is buried or destroyed under the direction of a receiver of wreck with authority from the Board of Trade, the expenses thereof shall be expenses of the local authority under that act, and shall be paid by them to the receiver on demand, and in default of payment shall be recoverable with costs from the local authority by the receiver of wreck. 41 & 42 Vict. c. 74, ss. 5, 53.

It is provided by the M. S. Act, 1876, s. 31, that a wreck commissioner appointed under that act may, at the request of the Board of Trade, by himself, or by some deputy approved by the Board of Trade, institute the same examination as a receiver of wreck under sect. 448 of the M. S. Act, 1854, and shall for that purpose have the powers by that section conferred on a receiver of wreck (see *supra*, p. 687).

(*g*) The M. S. Act, 1854, ss. 441-457; and Sched. Table V., Appendix, p. clxiv. The fees and expenses of the receivers of droits of Admiralty appointed under the 9 & 10 Vict. c. 99, and of the sergeants of the Admiralty Court of the Cinque Ports are regulated by ss. 12 and 13 of the Merchant Shipping Act Repeal Act, 1854. (Appendix, p. clxvii.)

(*h*) See as to the sale by a receiver of goods of a perishable nature or small value, s. 453, and *supra*, p. 656, note (*p*). Where a barge was found adrift in the River Thames, and was restored to her owners by the salvors, it was decided that this section had no application. *The Zeta*, L. R., 4 A. & E. 460.

who may satisfy him that he is entitled to it, upon payment of expenses, fees, and salvage.

By sect. 52 of the Merchant Shipping Act, 1862, the delivery of wreck, or of the proceeds of wreck, by the receiver to any one in pursuance of the provisions of the Merchant Shipping Act, 1854, discharges him from all liability in respect of it, but does not prejudice or affect any question of right or title to the wreck which may be raised by third parties, or any question concerning the title to the soil on which the wreck may have been found.

By sect. 474 of the Merchant Shipping Act, 1854, the Board of Trade may, with the consent of the Treasury, buy any rights of wreck other than those belonging to the Crown (*i*).

By sect. 475 of the last-mentioned act, if no owner establishes a claim to wreck within the year, and no other person is proved to be entitled to it, the receiver must sell it, and after paying fees, expenses, and salvage, must pay the balance into the Exchequer (*k*).

Jurisdiction
of justices.

By sect. 472, disputes with respect to the title to wreck may, in these cases, be determined by two justices in the same way as salvage disputes (*l*).

Wreck in the
case of foreign
ships.

It is provided by sect. 19 of the Merchant Shipping Act, 1855, that whenever any articles belonging to or forming part of any foreign ship wrecked on the coasts of the United Kingdom, or her cargo, are found on or near those coasts, or brought into port, the consul-general of the country to which the ship or the owners of the cargo belonged (or any consular officer of that country duly authorized) is, in the absence of the owners, or their agent or master, to be deemed the agent of the owners so far as relates to the custody or disposal of the articles so found.

(*i*) For the purpose of facilitating these purchases, this section provides, that the provisions of the Lands Clauses Consolidation Act, 1845, and of the corresponding statute of the same year for Scotland, shall be deemed to be incorporated with the Merchant Shipping Act, 1854.

(*k*) By s. 53 of the M. S. Act, 1862, the above-mentioned provisions have been amended so as to protect the rights of the Crown, the Duchy of Lancaster and the Duchy of Cornwall

with reference to wreck.

(*l*) See the M. S. Act, 1854, s. 460, and *supra*, p. 654. If either party is unwilling to refer to two justices, or dissatisfied with their decision, proceedings may be taken within three months from the expiration of the year, in any Court of Law, Equity, or Admiralty having jurisdiction. See s. 473. As to the construction to be put upon Crown grants of wreck, see *The King v. Forty-nine Casks of Brandy*, 3 Hagg. 257, and *The Pauline*, 2 W. Rob. 358.

All wreck, being foreign goods brought or coming into the United Kingdom or the Isle of Man, is subject to the same duties as if it was imported; and if any question arises as to the origin of the goods, they are to be deemed to be the produce of such country as the Commissioners of Customs may upon investigation determine (*m*). The Commissioners of Customs and Excise are bound to permit all goods saved from any ship stranded or wrecked on its homeward voyage, to be forwarded to the port of her original destination, and all goods saved from any ship stranded or wrecked on her outward voyage to be returned to the port at which they were shipped (*n*).

Customs duties on wreck.

We have already seen that timber found floating at sea without an apparent owner, having drifted from the place where it was moored in a river, is not "wreck" within the meaning of the Merchant Shipping Act, 1854 (*o*).

Provision is also made by the Merchant Shipping Act, 1854, for the punishment of offences in respect of wreck, and for enabling the owners of any ships, boats, or cargoes plundered, damaged, or destroyed, by persons riotously and tumultuously assembled to recover compensation from the hundred or district in which the offence was committed (*p*).

Offences in respect of wreck.

Sect. 478 of the same act provides as follows:—

Any persons who wrongfully carry away any part of a ship or boat stranded, or in danger of being stranded, or in distress, on or near the shore of any sea or tidal water, or any part of the cargo or apparel, or any wreck, or,

Under Merchant Shipping Acts.

Endeavour in any way to impede or hinder the saving of the ship, boat, cargo, apparel, or wreck, or who

Secrete any wreck, or obliterate or deface any marks on it, are liable, in addition to any other punishment to which they may be subject, to a penalty not exceeding 50*l*. (*q*).

(*m*) M. S. Act, 1854, s. 499. See *Barry v. Arnaud*, 10 A. & E. 646 (which was a decision upon the 3 & 4 Will. 4, c. 52), as to what is "wreck" within the meaning of this section. It is provided by the 39 & 40 Vict. c. 35 (s. 1 and sched.), that all goods derelict, jetsam, flotsam and wreck brought or coming into the United Kingdom, and all droits of Admiralty sold in the United Kingdom, shall be subject and charged with the same duties as are

chargeable on the like kind of goods on importation into the United Kingdom.

(*n*) M. S. Act, 1854, s. 500. The Commissioners must take security in these cases for the due protection of the revenue. *Ib*.

(*o*) See *Palmer v. Rouss*, 3 H. & N. 505, and *ante*, p. 643, note (*j*).

(*p*) M. S. Act, 1854, ss. 477 to 479.

(*q*) Where a ship is in distress, the master may prevent by force any person from attempting to board the ship un-

Any person who takes into a foreign port or place and there sells any ship or boat so stranded, derelict, or in distress, or any part of the cargo, or anything belonging to her, or any wreck, is guilty of felony, and subject to penal servitude for a term not exceeding four years (*r*).

Under other
acts.

By the general act relating to malicious injuries to property (24 & 25 Vict. c. 97), sect. 49, the unlawfully and maliciously destroying any part of a ship which is in distress, or wrecked, stranded, or cast on shore, or any goods belonging to her, is made a felony punishable by penal servitude or imprisonment. And by the Larceny Act (24 & 25 Vict. c. 96), sect. 64, stealing any part of any ship in distress, wrecked, stranded or cast on shore, or any goods or articles belonging to her, is made a felony, punishable in like manner. By sect. 65 of this act, persons in possession of shipwrecked goods, and not satisfying a magistrate that they have come lawfully by them, may be punished; and by sect. 66, if any one offers for sale any shipwrecked goods which have been, or may be reasonably suspected to have been, unlawfully taken from any shipwrecked or distressed ship, the sale may be stopped, and the offender may, on conviction of the unlawful possession, be punished.

Dealers in
marine stores
and manu-
facturers of
anchors.

In sects. 480 to 482 of the Merchant Shipping Act, 1854, provisions are contained respecting persons dealing in anchors, cables, sails and other marine stores. The regulations of the statute in this respect are very minute, and do not fall within the scope of this work (*s*).

By sect. 483 of the last-mentioned act, all manufacturers of anchors are bound to mark in legible characters on the crown and also on the shank and under the stock their name or initials, with the addition of a progressive number and the weight of the anchor. A penalty not exceeding 5*l*. is incurred for each offence against this provision (*t*).

less he is a receiver or person authorized by the act to take the command of ships in distress, or a person acting under orders from such a receiver or person. A penalty of 50*l*. is incurred if any unauthorized person attempts to board a ship contrary to these provisions.

(*r*) M. S. Act, 1854, s. 479.

(*s*) See Appendix, pp. cxlii—cxliii.

(*t*) See the Chain Cable and Anchor Act, 1871, 34 & 35 Vict. c. 101, s. 7 (Appendix, p. cccxii), prohibiting the sale of any unproved chain cable whatever, or any unproved anchor exceeding in weight 168 pounds, unless the same is purchased as old iron. For special provision as to the salvage of anchors, cables and other ships' stores in and at the mouth of the Humber, see 2 & 3 Will. 4, c. cv, ss. 54—56.

The mode of proceeding with respect to wreck and derelict goods found within the jurisdiction of the Cinque Ports was formerly regulated by the statutes 1 & 2 Geo. 4, c. 76, and the 9 & 10 Vict. c. 99. The latter act is now wholly repealed, and the sections of the former act relating to this subject are also now repealed, so that the procedure with respect to wreck within the jurisdiction of the Cinque Ports is now the same as elsewhere (u).

Wreck within
Cinque Ports.

The following provisions are in force in relation to the removal of wrecked vessels and their cargoes, and other obstructions impeding navigation :—

REMOVAL OF
WRECKED
VESSELS AND
THEIR CAR-
GOES.

By harbour
masters.

By the 56th section of the Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), power is given to the harbour masters within that act to remove wrecks or other obstructions to the harbours, docks, or piers within their jurisdiction, or the approaches thereto, and floating timber impeding their navigation, and the expense of so doing is to be repaid by the owners. The harbour masters may detain the wreck, obstruction, or floating timber, and sell the same to reimburse themselves (if the expenses are not paid to them), rendering the overplus to the owners on demand (x).

By the 13th section of the Dockyard Ports Regulation Act, 1865 (y), it is provided, that with respect to the ports, harbours, roadsteads, sounds, channels, creeks, bays and navigable rivers defined as dockyard ports by that act (z), the queen's harbour master may remove any wreck or other thing being an obstruction to the dockyard port over which he exercises authority, or to the approaches thereof, and any floating timber that impedes the navigation thereof.

By queen's
harbour
masters.

(u) See the Merchant Shipping Act Repeal Act, 1854, Appendix, p. clxv. and *ante*, p. 668; but see *supra*, p. 676, note (e), as to the performance by the serjeants of the Admiralty Court of the Cinque Ports of the duties of receivers of wreck. As to droits of Admiralty within the Cinque Ports, see *The Ooster Eems*, 1 Rob. 284, note, Hay & Marriott, Preface, p. xxvii.

(x) Supplementary Appendix, p. 145. See as to the removal of unseaworthy vessels, sect. 57; and as to the appointment of harbour masters within the act, see sect. 51. The expenses of the removal can only be recovered under this section from the persons who were owners of the wreck at the

time of the casualty. *Lord Eglington v. Norman*, 46 L. J., Ex. 557. Special provision as to the removal of wrecks in the Mersey are contained in the 21 & 22 Vict. c. xcii. s. 56. See *Irivan v. The Mersey Docks and Harbour Board*, L. R., 5 C. P. 19. As to the powers of the Thames Conservancy for the removal of wreck in the Thames, see the 21 & 22 Vict. c. cxlvii. s. 86, and *The Ettrick*, 6 P. D.

(y) 28 & 29 Vict. c. 125 (Appendix, p. cclxii).

(z) See sect. 2 and Appendix "Orders in Council," p. 48, and Order in Council of the 29th June, 1878, as to Portland.

By conservancy or harbour authorities.

The 4th section of the Removal of Wrecks Act, 1877 (*a*), which does not apply to ships belonging to her Majesty, and the provisions of which are to be deemed in addition to any other powers for the like object (*b*), provides that where any vessel is sunk, stranded, or abandoned in any harbour (*c*) or tidal water (*d*) under the jurisdiction of a conservancy or harbour authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove, or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal, or destruction thereof, and may sell, in such manner as they think fit, any vessel or part thereof so raised or removed, and also any other property recovered in the exercise of their powers under the act, and may out of the proceeds of such sale reimburse themselves for the expenses incurred by them under this act, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto (*e*).

By the general lighthouse authorities.

By the 5th section of the same act, it is provided that, where any vessel is sunk, stranded, or abandoned in any fairway, or on the seashore, in the United Kingdom, the Channel Islands, or the Isle of Man, or any of the adjacent seas or islands, and there is not any harbour or conservancy authority (*f*) having power to raise, remove or destroy the same, the general lighthouse authority (*g*) for that part of the United Kingdom in or near which the vessel is situate shall, if in their opinion the same is or is likely to become an obstruction or danger to navigation, have the same powers in relation thereto as are by this act conferred upon a harbour or conservancy authority.

The same section provides that all expenses incurred by the

(*a*) 40 & 41 Vict. c. 16, and Appendix, p. ccclii.

(*b*) Sects. 2 and 8, and see *The Cybele*, 2 P. D. 228; 3 P. D. 8.

(*c*) The word "harbour" is defined by the act to include "harbours" properly so called, whether natural or artificial, estuaries, navigable rivers, piers, jetties and other works in or at which ships can obtain shelter, or ship and unship goods or passengers. 41 & 42 Vict. c. 16, s. 3.

(*d*) See sect. 3.

(*e*) Except in the case of perishable property, the sale is not to take place until after advertisements have been issued as directed by the act; and if the owner applies at any time before sale, he is to be entitled to have the property delivered to him on payment of the fair market value, to be ascertained by agreement or as the act directs. Sect. 4.

(*f*) See sect. 3.

(*g*) See sect. 3; the M. S. Act, 1854, s. 389, and *infra*, p. 684.

general lighthouse authorities under the act, and not reimbursed in the manner provided for by the act, shall be paid out of the Mercantile Marine Fund (*h*). It is further provided by the same act that the provisions thereof shall apply to every article or thing, or collection of things, being part of the equipments, cargo, stores, or ballast of a vessel, in the same manner as if such article, thing, or collection of things, was included in the term vessel (*i*).

The 7th section of the act provides that if any question arises between a harbour or conservancy authority on the one hand and a general lighthouse authority on the other hand, as to their respective powers under this act in relation to any place being in or near an approach to a harbour or tidal water, the same shall, on the application of either authority, be referred to the decision of the Board of Trade, and that their decision shall be final.

Settlement of
wreck re-
newal dis-
putes by
Board of
Trade.

With a view of diminishing the dangers of navigation, and the number of wrecks, seamarks, beacons and lighthouses have from early times been established on the coasts of the United Kingdom (*k*). The earlier public acts containing provisions of a general nature in relation to this subject are now repealed, and the statutory provisions now in force with respect to lighthouses, buoys and beacons are for the most part contained in the Merchant Shipping Acts, 1854, 1855 and 1862.

STATUTORY
PROVISIONS
AS TO LIGHT-
HOUSES, LIGHT
VESSELS AND
LIGHT DUES.

The Merchant Shipping Act, 1854, contains, in sects. 389—413, provisions for the management, construction and main-

(A) It is provided by sect. 5 of the Merchant Shipping (Fees and Expenses) Act, 1880 (Appendix, p. cccxxxiii), that expenses incurred by the general lighthouse authorities under this section shall be subject to the provisions contained in ss. 422, 423, 427 of the M. S. Act, 1854, with respect to the expenses incurred by such authorities for lighthouse purposes under that act.

(i) Sect. 6. The proceeds of the sale of a vessel and her cargo, and any property recovered therefrom, are to be regarded as a common fund. *Id.*

(k) See 3 Inst. 205; 8 Eliz. c. 13. This act, now repealed by the Merchant Shipping Repeal Act, 1854 (Appendix, p. clxv), and by the 27 & 28 Vict. c. 113, s. 49, provided that the master, wardens and assistants

of the Trinity House of Deptford Strond might "at their costs, from time to time, erect and maintain such and so many beacons, marks and signs for the sea in such places and uplands near to the sea coasts, only for sea marks, as they should think fit," and also that "no steeples, trees or other things standing as beacons or seamarks should, after notice given as provided by the act, be taken, felled or otherwise cut down." See also 4 Anne, c. 21, "An Act for the better enabling the master, wardens and assistants of Trinity House to rebuild the lighthouse on the Edystone Rock;" the 4 & 5 Will. 4, c. 68, providing for the maintenance of the lighthouse at The Mumbles, and the preamble of the 6 & 7 Will. 4, c. 79, repealed by the Merchant Shipping Repeal Act, 1854.

Powers and duties of general lighthouse authorities.

tenance of the lighthouses, buoys and beacons, under the control of the three general lighthouse authorities of the United Kingdom, the Trinity House of Deptford Strond, the Commissioners of Northern Lighthouses, and the Commissioners of Irish Lights (*l*). These provisions, amongst other things, empower the Trinity House of Deptford Strond to enter and view any lighthouses within the jurisdiction of either of the two latter bodies, and enable the Board of Trade, upon complaint that any lighthouse, buoy, or beacon under the management of any of the general lighthouse authorities, is inefficient or improperly managed, or unnecessary, to appoint inspectors to make inquiry into the matter (*m*); and further provide that the general lighthouse authorities shall, for certain purposes and with the sanction of the Board of Trade, have control over such local lighthouse authorities as are within their respective jurisdictions (*n*).

Levying of light dues.

The 396th section of the act provides for the levying of light dues in respect of the lighthouses, buoys and beacons which were in existence within the jurisdictions of the general lighthouse authorities at the time of the coming into operation of the act; and sections 397 and 410 empower her Majesty, by order in council, to reduce, increase, vary or alter the light dues payable in respect of either existing or future lighthouses, buoys, and beacons within such jurisdictions, and to fix the light dues to be payable in respect of any new lighthouse, buoy, or beacon (*o*); whilst sect. 398 empowers the three general lighthouse authorities, with the consent of her Majesty in council, to alter the light dues receivable by them, and to exempt any ships or classes of ships from the payment of light dues, and annex any terms or conditions to such exemption (*p*).

By sect. 403, all light dues coming to the hands of the three general lighthouse authorities are to be carried to the account of the Mercantile Marine Fund (*q*).

(*l*) The M. S. Act, 1854, ss. 389, 390, 391, and the 30 Vict. c. lxxxi.

(*m*) Sect. 393.

(*n*) See also sect. 413 as to the surrender of local lighthouses, buoys or beacons to the general lighthouse authorities.

(*o*) See Appendix, Orders in Council, pp. 31–33, and Supplementary Appendix, p. 172. Tables of all light dues, and all copies of the regulations in force in respect thereof, must by

sect. 399 of the M. S. Act, 1854, be posted up at all custom houses in the United Kingdom.

(*p*) See Appendix, Orders in Council, pp. 34–35, Supplementary Appendix, p. 172.

(*q*) As to this fund see the M. S. Act, 1854, ss. 417–430. See 16 & 17 Vict. c. 131, s. 24, as to the cases where the consent of the Board of Trade is required before the mortgage or sale of light dues.

By sect. 44 of the Merchant Shipping Act, 1862, the persons liable to pay light dues for any ship are declared to be the owner or master and the consignees or agents of the ship who have paid or made themselves liable to pay any other charge on account of the ship at the port of arrival or discharge (*s*). And by sect. 45, all consignees or agents (not being the owners or masters) who are made liable by the act for the payment of light dues may retain the amount paid by them in these cases from any moneys in their hands belonging to the owners of the ship.

Payment and recovery of light dues.

The same act contains, in sects. 46, 47, provisions as to the inspection of local lighthouses, buoys, and beacons, and as to the levying from ships, and the application of dues for local lighthouses, which it is not necessary to mention here in detail (*t*). By the 39 & 40 Vict. c. 27, it is provided that local lighthouse authorities may, with the consent of her Majesty in Council, reduce all or any of the light dues receivable by such authority (*u*).

Local lighthouses and local light dues.

The lighthouses, buoys, and beacons in the Thames are now vested in and under the control of the Trinity House of Deptford Strond (*v*).

By sect. 415 of the Merchant Shipping Act, 1854, when a fire or light is burnt or exhibited so as to be liable to be mistaken for a light proceeding from a lighthouse, the general lighthouse authority for the district may require it to be extinguished or effectually screened. It is moreover provided by sect. 47 of the 24 & 25 Vict. c. 97 (the general act relating to malicious injuries to property), that if any person unlawfully masks, alters, or removes a light or signal, or unlawfully exhibits any false light or signal, with intent to bring any ship, vessel, or

Offence of exhibiting false signals, &c., and removing buoys, &c.

(*s*) By the same section it is provided, that light dues shall be recoverable in the same manner as penalties of the same amount are recoverable under the M. S. Act, 1854. See s. 518, and *supra*, p. 189. As to colonial lighthouses, see the M. S. Act, 1855, ss. 2—7, and the Basses Lights Acts, 1864 and 1872 (32 & 33 Vict. c. 77; 35 & 36 Vict. c. 55). The Admiralty Court formerly exercised jurisdiction in suits of beaconage. *Crosse v. Digges*, 1 Siderfin, 158.

(*t*) As to the jurisdiction of the Trinity Houses of Hull and Newcastle as local lighthouse authorities, see The Report of the Parliamentary Com-

mittee on Lighthouses, 1845; 6 & 7 Will. 4, c. 79, s. 37; 6 Geo. 3, c. xxxi; 41 Geo. 3, c. lxxxvi. See also 42 Geo. 3, c. xliii (relating to the Spurn Point and Tynemouth Lighthouses, now vested in the Trinity House of London), and 45 Geo. 3, c. lxx (North Shields Lighthouses). Orders in Council of the 12th Sept. 1863, and the 5th of Feb. 1876, are in force with respect to the lights under the jurisdiction of the Trinity House of Hull. As to the lighting and buoyage of the Upper Mersey, see 39 & 40 Vict. c. civ.

(*u*) See Appendix, p. cccxxxvi.

(*v*) See 27 & 28 Vict. c. 113, and 41 & 42 Vict. c. ccxvi.

boat into danger, or unlawfully and maliciously does anything tending to the immediate loss or destruction of any ship, vessel, or boat, he shall be guilty of felony. By sect. 48 of this act, it is also made felony unlawfully and maliciously to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other manner unlawfully and maliciously to injure, or conceal, any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen, or the purpose of navigation (x).

Costs of
advertising
foreign light-
houses, &c.

The 6th section of the Merchant Shipping Act (Payment of Fees), 1880, provides that such reasonable costs as the Board of Trade from time to time allow of advertising or otherwise making known the establishment of or alteration in foreign lighthouses, buoys, and beacons, to owners and masters of, and other persons interested in, British ships, shall be paid out of the Mercantile Marine Fund (y).

INQUIRIES AND
INVESTIGA-
TIONS INTO
WRECKS AND
SHIPPING
CASUALTIES.

The Merchant Shipping Acts, 1854 to 1876, and the Shipping Casualties Investigations Act, 1879 (42 & 43 Vict. c. 72), contain the following provisions for instituting preliminary inquiries, and holding formal investigations, in cases of shipping casualties.

Preliminary
inquiries by
coast guard
or other
officer.

By sect. 432 of the Merchant Shipping Act, 1854, it is provided, that whenever any ship is lost, abandoned, or materially damaged, on or near the coasts of the United Kingdom, or causes loss, or material damage, to another ship on or near these coasts, and whenever loss of life ensues by reason of any casualty to or on board of a ship on or near these coasts, and whenever any of these event happens elsewhere and competent witnesses of it arrive in the United Kingdom, the inspecting officer of the coastguard, or principal officer of customs, nearest to the place of the occurrence, or near to the place where the witnesses arrive or can be conveniently examined, or a person appointed by the Board of Trade, may make inquiry into the matter (z).

Jurisdiction
of magistrates
to hold formal
investiga-
tions.

By sect. 433, if the person entitled to make this inquiry thinks that a formal investigation is expedient, or if the Board of Trade so directs, application may be made to two justices or to a stipen-

(x) The doing of any acts with intent to commit any of the offences mentioned in this section, is also made a felony. 24 & 25 Vict. c. 97, s. 48.

(y) 43 & 44 Vict. c. 12, Appendix p. cccxxxm. As to this fund, see the M. S. Act, 1854, ss. 417-429. See also 16 & 17 Vict. c. 131, in part re-

pealed by the Merchant Shipping Act Repeal Act, 1854, ss. 4 and 8.

(z) All the powers given by the act to inspectors appointed by the Board of Trade are vested in these persons. M. S. Act, 1854, s. 432. See the M. S. Act, 1854, s. 14.

diary magistrate to hear the case. Where this is done the person entitled to make the inquiry must superintend the management of the case and assist the justices, who are bound, upon its conclusion, to send a statement of the case, and of their opinion upon it, to the Board of Trade (a).

The act, by sect. 436, gives to the justices a power over the costs of the inquiry, and provides that they shall be recoverable in the same manner as costs incurred in summary proceedings (b).

The 22nd section of the Merchant Shipping Act, 1873, provides, that if the managing owner, or, in the event of there being no managing owner, the ship's husband of any British ship have reason, owing to her nonappearance or to any other circumstance, to apprehend that she has been wholly lost, he shall, as soon as conveniently may be, send to the Board of Trade notice in writing of such loss and of the probable occasion thereof, stating the name of the ship and her official number (if any), and the port to which she belongs. If he neglects to do so within a reasonable time he incurs a penalty not exceeding fifty pounds (c).

Notice to
Board of
Trade of
apprehended
loss of ship.

The 29th section of the Merchant Shipping Act, 1876, enacts that for the purpose of rendering investigations into shipping casualties more speedy and effectual it shall be lawful for the Lord High Chancellor of Great Britain to appoint from time to time some fit person or persons to be a wreck commissioner or wreck commissioners for the United Kingdom, so that there shall not be more than three such commissioners at any one time, and to remove any such wreck commissioner; and provides that in case it shall become necessary to appoint a wreck commissioner in Ireland, the Lord Chancellor of Ireland shall have the appointment and the power of removal of such wreck commis-

Jurisdiction
of the wreck
commission-
ers.

(a) See *Ex parte Ferguson*, L. R., 6 Q. B. 280. As to the assessors summoned on such investigations, see *post*, p. 688; and for provisions extending the jurisdiction conferred by these sections, see *post*, p. 689. By sect. 435 of the M. S. Act, 1854, whenever there is a local marine board in existence, and a stipendary magistrate is a member of it, the investigation must be before him if present.

(b) Sect. 437 provides for the carrying on in Scotland of investigations of this kind.

(c) See also the M. S. Act, 1854, s. 326 (*supra*, p. 139), which provides that

notice of any material damage caused to or sustained by any steamer or her crew, shall be given to the Board of Trade. The 36th section of the M. S. Act, 1876, requires that the name and address of the managing owner for the time being of every British ship registered at any port or place in the United Kingdom, or where there is not a managing owner the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner, shall be registered at the custom house of the ship's port of registry.

sioner. The section also provides, that it shall be the duty of a wreck commissioner, at the request of the Board of Trade, to hold any formal investigation into a loss, abandonment, damage, or casualty (in the act called a shipping casualty) under the eighth part of the Merchant Shipping Act, 1854, and that for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and that all the provisions of the Merchant Shipping Acts, 1854 to 1876, with respect to investigations conducted under the eighth part of the Merchant Shipping Act, 1854, shall apply to investigations held by a wreck commissioner (*d*).

Procedure on such investigations.

The 30th section of the Merchant Shipping Act, 1876, provides that the wreck commissioner, justices, or other authority holding a formal investigation into a shipping casualty, shall hold the same with the assistance of an assessor or assessors of nautical, engineering, or other special skill or knowledge (*e*); and that each assessor shall either sign the report made on the investigation, or report to the Board of Trade his reasons for his dissent therefrom.

Assessors.

Practice Rules.

The same section further provides that general rules for carrying into effect the enactments relating to shipping casualties shall be from time to time made by the Lord Chancellor of Great Britain, with the consent of the Treasury, so far as relates to fees; and that every formal investigation into a shipping casualty shall be conducted in such manner that if a charge is made against any person that person shall have an opportunity of making a defence (*f*).

Place of holding investigation.

With a view of obviating any difficulty with respect to the local limits of the jurisdiction of the authority holding any

(*d*) Only one wreck commissioner has at present been appointed. The salaries of the wreck commissioners are to be paid out of monies provided by Parliament. M. S. Act, 1876, s. 39.

(*e*) As to the appointment of these assessors, see the M. S. Act, 1876, s. 30; 42 & 43 Vict. c. 72, s. 3, subs. 1, 2 (Appendix, p. cccclxxa), and Supplementary Appendix, pp. 193—195. As to their remuneration see the M. S. Act, 1876, s. 39. In cases where the investigation involves, or is likely to involve, any question as to the cancelling or suspension of the certificate of a master, mate or engineer, it must be held with the assistance of not less than two assessors having experience

in the merchant service. 42 & 43 Vict. c. 72, s. 3, subs. 3 (Appendix, p. cccclxxa).

(*f*) All such general rules are to have effect as if enacted in the M. S. Act, 1876. (M. S. Act, 1876, s. 30.) The general rules now in force are printed in the Appendix, "Forms," No. 64, pp. cccclxxx—cccclxxxiii, and Supplementary Appendix, pp. 193—195. As to the expenses of witnesses on such inquiries see "Forms," No. 62, Appendix, cccclxx. As to the practice prevailing in the Court of the Wreck Commissioner, see the judgment in *The Dinorah*, Nautical Magazine for March, 1877, p. 320.

formal investigation into a shipping casualty, it is provided by the 33rd section of the Merchant Shipping Act, 1876, that any such investigation may be held at any place appointed in that behalf by the Board of Trade, and that all enactments relating to the authority holding the investigation shall, for the purpose of the investigation, have effect as if the place so appointed were a place appointed for the exercise of the ordinary jurisdiction of that authority (*g*).

We have already noticed, in a previous chapter, that if, upon any inquiry conducted under the above-mentioned provisions, it is reported that the loss or abandonment of or any serious damage to any ship, or any loss of life has been caused (*h*) by the wrongful act of any master, mate or engineer holding a certificate issued by the Board of Trade under the Merchant Shipping Acts, the wreck commissioner, magistrates, or stipendiary magistrate, investigating the case, may, if the investigation has been held with the assistance of not less than two assessors having experience in the merchant service (*i*), suspend or cancel the certificate of such master, mate, or engineer (*k*).

Power of dealing with certificates of masters and officers under the Merchant Shipping Acts.

Where an Order in Council is in force under the 8th section of the Merchant Shipping Colonial Act, 1869, declaring that colonial certificates of competency granted in conformity with that act shall be of the same force as if they had been granted under the acts relating to merchant shipping, and that the provisions of those acts which relate to the suspension or

Under the Merchant Shipping (Colonial) Act, 1869.

(*g*) Shipping investigations are not to be held in a police court unless no other suitable place is, in the opinion of the Board of Trade, available, but they are to be held in some town-hall, assize or county court or public building, or in some other suitable place to be determined according to general rules made by the Lord Chancellor of Great Britain. The Shipping Casualties Investigations Act, 1879 (42 & 43 Vict. c. 72, s. 3, subs. 5), Appendix, p. cccxxb. Any rule so made must be laid before both Houses of Parliament. *Ib.* sect. 4.

(*h*) See *The Arizona*, 5 P. D. 123; *Ex parte Story*, 3 Q. B. D. 166.

(*i*) See the M. S. Act, 1876, s. 30, and the Shipping Casualties Investigations Act, 1879 (42 & 43 Vict. c. 72, s. 3, subs. 3), and *supra*, p. 688, n. (*e*).

(*k*) See *supra*, pp. 115—116, note (*u*), 117, and Appendix, p. cccxxa. In cases which may involve the suspension of any certificate, the decision come to

must be stated in open Court and a full report of the proceedings be sent to the Board of Trade, and a certificate can only be suspended or cancelled if a copy of the report or a statement of the case on which the investigation is ordered has been furnished to the owner of the certificate, and if one of the assessors has concurred in the decision. The M. S. Act, 1862, s. 23; the M. S. Act, 1876, s. 30. As to what is a sufficient "report or statement of the case" within this section, see *Ex parte Ferguson*, L. R., 6 Q. B. 287. Any master, mate or engineer whose certificate is suspended or cancelled must on demand deliver it to the board, Court or tribunal investigating the case, or, if it is not demanded by such board, Court or tribunal, to the Board of Trade, or as it directs. The M. S. Act, 1862, s. 24; the Shipping Casualties Investigations Act, 1879, s. 3, subs. 4 (Appendix, p. cccxxb).

cancelling of the certificates of competency granted under those acts shall apply to the certificates referred to in such order, the wreck commissioner, magistrates, or other authority holding an investigation into a shipping casualty, may, subject to any provisions to the contrary contained in such order, exercise the same jurisdiction to cancel or suspend the certificate of any master, mate, or engineer owning such a certificate as the order refers to, as they would have exercised if the certificate had been granted by the Board of Trade (l).

Extension of jurisdiction of magistrates and wreck commissioners under Merchant Shipping Act, 1876.

It is provided by the 32nd section of the Merchant Shipping Act, 1876, that whenever any ship on or near the coasts of the United Kingdom or any British ship elsewhere has been stranded or damaged, and any witness is found at any place in the United Kingdom, or whenever a British ship has been lost or is supposed to have been lost, and any evidence can be obtained in the United Kingdom as to the circumstances under which she proceeded to sea or was last heard of, the Board of Trade (without prejudice to any other powers) may, if they think fit, cause an inquiry to be made or formal investigation to be held, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, shall apply to any such inquiry or investigation as if it had been held under the above-mentioned provisions with regard to inquiries conducted before magistrates under the eighth part of the Merchant Shipping Act, 1854 (m).

This section does not extend the jurisdiction with respect to the cancellation or suspension of certificates of competency given by the provisions of the Merchant Shipping Acts, 1854 to 1862, and it consequently confers no jurisdiction on the authority holding the investigation to cancel or suspend the certificate of competency of a master, mate or engineer by whose wrongful act a ship has been stranded *without loss of life or material damage* (n).

Appeals and re-hearings of shipping casualty investigations.

The Shipping Casualties Investigations Act, 1879, sect. 2, enacts, as we have seen, that where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty, has been held under the Merchant Shipping Act, 1854, or any act amending the same, or under any provision for holding such investigations in a British possession, the Board of Trade may,

(l) 32 Vict. c. 11, s. 8 (Appendix, p. cccvi). The Orders in Council issued under this act are printed in the Appendix, "Orders in Council," pp. 1-12, and in the Supplementary Ap-

pendix, p. 169.

(m) See the M. S. Act, 1854, sects. 433-436, and *supra*, p. 686.

(n) *Ex parte Story*, 3 Q. B. D. 166, 169.

in any case, and shall, if new and important evidence which could not be produced at the investigation has been discovered, or if for any other reason there has in their opinion been ground for suspecting a miscarriage of justice, order that the case be re-heard, either by the Court or authority by whom it was heard in the first instance, or by the wreck commissioner, or in England or Ireland by a judge of her Majesty's High Court of Justice exercising jurisdiction in admiralty cases, or in Scotland by the senior Lord Ordinary, or any other judge in the Court of Session appointed for the purpose.

The same section provides that where, in any such investigation, a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a re-hearing under this section has not been made, or has been refused, an appeal shall lie from the decision therein; if the decision is given in England or by a naval Court, to the Probate, Divorce and Admiralty Division; if the decision is given in Scotland, to either division of the Court of Session; and if the decision is given in Ireland, to the High Court of Admiralty, or the judge or division of her Majesty's High Court of Justice exercising jurisdiction in admiralty cases (o).

Appeal only
where certifi-
cate dealt
with.

Under the provisions of sect. 14 of the Merchant Shipping Act, 1854, the Board of Trade may from time to time, whenever it seems expedient for them so to do, appoint any person as an inspector to report to them upon the nature and causes of any accident or damage which any ship has sustained or caused, or is alleged to have sustained or caused.

Inquiry
before Board
of Trade
inspector.

We have already seen that naval Courts abroad have, under the same statute, power to inquire into the wreck or abandonment of British ships (p).

Inquiries be-
fore Naval
Courts.

(o) 42 & 43 Vict. c. 72, s. 2 (Appendix, p. cccxxx) and *supra*, pp. 117, 118. See *The Arizona*, 5 P. D. 123; *Ewing v. The Board of Trade*, 7 Sess. Cas. (4th series) 835. The section also provides that any re-hearing or appeal under the section is to be subject to and conducted in accordance with such conditions and regulations as may from time to time be prescribed by general rules made under sect. 30 of the M. S. Act, 1876. General rules under this section have been recently issued, and are printed in the Supplementary Appendix, p. 196. The 4th section of the Shipping Casualties In-

vestigations Act, 1879 (Appendix, p. cccxxx), provides that any general rule made in pursuance of the act shall be laid before both houses of parliament within thirty days after it is made, if parliament be then sitting, or if not, within thirty days after the commencement of the then next ensuing session. Before the issue of any general rules in pursuance of the act it was held, that the section in the text gave the Court, hearing an appeal under it, jurisdiction over the costs of the appeal. *The Arizona*, 5 P. D. 123.

(p) See the M. S. Act, 1854, s. 260, and *ante*, p. 191.

CHAPTER XI.

PASSENGERS.

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GENERAL RIGHTS AND

PASSENGERS on board a ship are entitled, independently of any statutory provision or special contract, to protection, and to

kind and considerate treatment on the part of the master. They are bound, on the other hand, to conform, in all respects, to the regulations and discipline of the vessel on which they have embarked (*a*). They must give their assistance, if it becomes necessary and is required by the master, in cases of sea perils and attacks by enemies (*b*). They are not entitled to claim salvage for services so rendered, unless they do more than they are bound to do; as, for instance, by assisting in the navigation of a vessel after the master and some of the crew have left her in peril (*c*), or by rescuing the ship after capture by an enemy (*d*). In an early case, where the passengers cast the merchandise overboard in a storm, under circumstances which made the sacrifice necessary for the preservation of their lives, it was held that they were not liable to the owners of the goods (*e*).

DUTIES OF
PASSENGERS.

The rights of passengers with respect to passage money depend upon the principles which regulate ordinary contracts. Where a passenger is induced to enter into the contract by representations which are fraudulent, that is to say, false within the knowledge of the party making them, the contract is void; even whether or not the misrepresentations are embodied in the contract (*f*). Where the representations are not fraudulent, but are untrue in point of fact, their untruth forms an excuse for the non-performance of the agreement on the part of the passenger, if they relate to the essence of the contract. Whether any particular representation is essential depends upon the intention of the parties as apparent from the contract, and the surrounding circumstances. Thus, where statements were made to a passenger by the shipowner that the ship would sail on a particular day, but she did not do so, and consequently the passenger refused to go, the jury were directed that if the day named was not understood to be essential, and the ship sailed within a reasonable time, the shipowner was entitled to recover

Rights with
reference to
passage
money.

(*a*) See the observations on this subject in Dana's *Seaman's Manual*, chap. 3.

(*b*) *Boyce v. Bayliffe*, 1 Camp. 58; and the judgment of Lord Alvanley in *Newman v. Walters*, 3 B. & P. 615.

(*c*) *Newman v. Walters*, *ubi supra*; *The Frede*, Lush. 322. See also Chap. "SALVAGE."

(*d*) See *The Two Friends*, 1 Rob. 271, and *ante*, p. 647. On a capture the

passengers' luggage passes to the captors as well as the cargo. See the judgment of Lord Ellenborough in *Mulloy v. Backer*, 5 East, 322.

(*e*) *Mousse's case*, 12 Rep. 63. No question of general average appears to have been raised in this case.

(*f*) See, in illustration of these principles, *Moens v. Heyworth*, 10 M. & W. 147; *Wontner v. Shairp*, 4 C. B. 404, note (*i*).

one-half of the passage-money, this being shown to be the usage of the trade (*g*). Where the owners of ships sailing to Australia guaranteed that the ship should sail from Plymouth on the 25th of August, and the plaintiff engaged a passage in her and paid a deposit, it was held that the plaintiff was justified, the ship not having arrived at Plymouth until the third of September, in taking a passage in another vessel, and that he was entitled to recover the deposit and the expenses he had been put to by the delay at Portsmouth (*h*). Where the ship is lost after the commencement of the voyage, the passage money if paid cannot be recovered back; but it is otherwise if the loss occur before the commencement of the voyage (*i*). Where the master of a ship had contracted to bring passengers home in it, and had laid in stores for the voyage, and he died before the commencement of the voyage, it was held that his representatives were entitled to recover from the chief mate, upon whom the command had devolved, the sums received from the passengers for passage money and subsistence (*k*).

Rights as
against
master.

Subject to the general rules already mentioned, the duties of the master towards the passengers vary with the contract in each particular case. Trivial infractions are hardly the subject of an action. For instance, if a master were sued for not furnishing good and fresh provisions, it would be necessary to show that a real grievance had been sustained, for damages ought not to be given for every trifling inconvenience (*l*).

The master has, it would seem, a right to exclude a passenger from the table at which the other passengers mess for conduct unbecoming a gentleman; a threat of violence towards himself would certainly justify him in so doing (*m*).

Rights with
reference to
luggage.

The master of a ship has no lien for the passage money, on the passenger himself, or on the clothes which he is actually wearing;

(*g*) *Yates v. Duff*, 5 C. & P. 369, and the cases cited above. A common form of fraud has been the advertising of passenger ships by their ordinary instead of their register tonnage; the latter being, in some extreme cases, only one-half of the former. Sect. 70 of the Passengers Act, 1855, imposes penalties on any persons, who, by false representation as to the size of the ship, or otherwise by any false pretence or fraud, induce any one to engage a

passage in any ship. As to what is intended by describing a ship as a steamship, see *Fraser v. The Telegraph, &c. Co.*, L. R., 7 Q. B. 566.

(*h*) *Cranston v. Marshall*, 5 Exch. 395.

(*i*) *Gillan v. Simpkin*, 4 Camp. 241.

(*k*) *Siordet v. Brodie*, 3 Camp. 263.

(*l*) *Young v. Fewson*, 8 C. & P. 463.

(*m*) *Prendergast v. Compton*, 8 C. & P. 464, and see *ante*, pp. 126, 127.

but he has a lien for it on the luggage of the passenger (n). Where a passenger took a passage in a ship on the terms that the ship was not to be accountable for luggage unless bills of lading were signed for it; and that the passenger would be allowed twenty cubic feet of luggage free, and the passenger's luggage was received on board, no bill of lading being given or demanded, and was afterwards lost, it was held that the owners were not liable for the loss, although it was caused by the ship being wrecked owing to the negligence of the captain (o).

A passenger in an English vessel belonging to an English company signed a ticket for a voyage from Southampton to the Mauritius containing certain conditions, one being "the company does not hold itself liable for damage to, or loss or detention of, passengers' luggage." Part of the luggage of the passenger being lost during the voyage, it was held that the contract was to be interpreted by the law of England, being the country wherein the contract was made, and that the company had power to limit their liability by special agreement, and therefore was not liable (p).

Where contract made for foreign voyage in English ship.

Where a contract is with a railway company for the carriage of goods partly on land by railway, and partly by sea, it is governed by the Traffic on Railways and Canals Act, 1854 (17 & 18 Vict. c. 31). This act applied only to land carriage, but by the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31, its provisions were extended to steam vessels owned or worked by railway companies, and by the Railways Regulation Act, 1871, to cases in which a railway company under contract to carry persons or goods by sea procure the same to be carried in a vessel not belonging to or worked by the company (q).

Where contract with railway company.

The ordinary remedy of a passenger for any breach of contract or misconduct on the part of the master or owners, was an action at law (r). The Admiralty Division has also jurisdiction

Remedies open to passengers apart from statute.

(n) *Wolf v. Summers*, 2 Camp. 631.

(o) *Wilton v. The Atlantic Royal Mail Steam Navigation Company*, 10 C. B., N. S. 453; *Taubman v. Pacific Steam Navigation Company*, 26 L. T. 704. As to the effect of a notice on the back of a passenger's ticket restricting the liability of the carrier as to luggage, see *Henderson v. Stevenson*, L. R., 2 H. L. Sc. App. 470; *Parker v. The South Eastern Rail. Co.*, 2 O. P. D. 416; *Harris v. The South Western Rail. Co.*, 1 Q. B. D. 515, 528.

(p) *The Peninsular and Oriental Steam*

Company v. Shand, 3 Moo. P. C., N. S. 272.

(q) See as to these acts, *supra*, p. 358.

(r) As to the remedies open to passengers under the Passengers Acts, see *infra*, pp. 704, 716. Where eight passengers in the same ship brought separate actions against the owner for breach of contract, the Court refused to stay seven of them upon an undertaking that they should abide the event of one; *Westbrook v. The Australian Royal Mail Steam Navigation Company*, 14 C. B. 113; and see now

in rem to entertain questions of personal damage to passengers (*s*).

STATUTORY
PROVISIONS
RELATING TO
PASSENGERS.

Numerous acts of parliament have been, from time to time, passed for the protection of emigrants and other passengers in merchant vessels, and for the encouragement of emigration (*t*). In addition to such of the provisions of these acts as are now in force, and as we shall find relate specially to particular descriptions of passenger ships, there are some statutory provisions, applicable to all British merchant ships, which ought not to be passed over without notice in this chapter, since passengers on board the ships to which they relate are equally partakers of whatever benefits arise from their operation.

As to loss of
life or per-
sonal injury.

Thus, the provisions of the Merchant Shipping Act, 1854, and of the Merchant Shipping Act, 1862, limiting the liability of shipowners in cases of loss of life or personal injury caused to any person carried in any ship, which have been mentioned in an earlier chapter, are applicable to passengers (*u*). So also the provisions which have recently been passed by the legislature with regard to deck loads of timber, the loading of grain cargoes, and the detention of unseaworthy ships, extend to ships carrying passengers; as also do the provisions with respect to medicines and medical stores contained in the Merchant Shipping Act, 1867 (*v*).

Unsafe ships,
&c.

Report of
accidents.

We have already seen that sect. 326 of the Merchant Shipping Act, 1854, requires reports of all serious accidents to steamships to be forwarded to the Board of Trade by the owners or masters of such vessels (*w*). This statute also re-

the Rules of the Supreme Court, Order LI. rule 4.

(*s*) *The Ruckers*, 4 Rob. 73. See also the judgment of Sir Robert Phillimore in *The Franconia*, 2 P. D. at p. 169.

(*t*) The first separate act for regulating passenger ships was the 43 Geo. 3, c. 56 (1803). See also the 5 & 6 Vict. c. 107; the 8 & 9 Vict. c. 14; the 9 & 10 Vict. c. 100; the 10 & 11 Vict. c. 103; the 11 & 12 Vict. c. 6, s. 81; the 12 & 13 Vict. c. 33; the 14 Vict. c. 1; the 14 & 15 Vict. c. 79 (the Steam Navigation Act, 1851), and the 15 & 16 Vict. c. 44 (the Passengers Act, 1852), all now repealed except as to proceedings begun and liabilities created under the latter of these acts. See the Merchant Shipping Repeal Act, 1854, Appendix, p. clxv, and the Passengers

Act, 1855, Appendix, p. clxxvii.

(*u*) See *ante*, pp. 78—85, the M. S. Act, 1854, s. 506, and the M. S. Act, 1862, s. 54. By sect. 56 of the latter of these acts, in any proceeding against a shipowner for loss of life, the master's list or the duplicate list of passengers required to be delivered to the officers of Customs under the Passengers Act, 1855 (see *infra*, p. 715), is, in the absence of proof to the contrary, to be sufficient proof that the persons in respect of whose death the proceedings are instituted were passengers on board the ship at the time of their death.

(*v*) See *supra*, pp. 34—37, 205, 206, and *ante*, Chap. IV. CREW.

(*w*) See *supra*, p. 139.

quired (by sect. 327) that notice should be given to the Board by the owner in all cases in which it was apprehended that any steamship had been wholly lost. This enactment has been repealed by the Merchant Shipping Act, 1873, s. 33, but sect. 22 of that act contains a similar provision, applicable not only to steamships, but also to all other British ships (x).

With the view of preventing the occurrence of accidents, provisions were contained in sect. 329 of the Merchant Shipping Act, 1854, relative to the carrying on board ship of goods of a dangerous nature; and by sect. 38 of the Merchant Shipping Act, 1862, these enactments were extended to foreign ships when within the limits of the United Kingdom. Both these sections are repealed by the Merchant Shipping Act, 1873, s. 33; and by sects. 23—28 of that act, restrictions are put upon any person sending or attempting to send, or any persons other than the master or owner carrying or attempting to carry in any ship any goods of a dangerous nature, and if such persons ship or attempt to ship any goods of a dangerous nature without marking outside the package containing them certain particulars required by the act, or neglect to give written notice to the master or owner at or before the goods are sent to be shipped or taken on board, or if the goods or the senders or the carriers of the goods are falsely described, a penalty of 100*l.* is incurred. The master or owner may refuse to take on board any package which he may suspect to contain such goods, and may require it to be opened to ascertain the fact; and if any package containing such goods is sent without being marked or without notice, it may be thrown overboard. Where goods are sent in breach of the requirements of the act, any Court having Admiralty jurisdiction may declare them forfeited.

Carrying
dangerous
goods.

These provisions are declared to be in addition to and not in substitution of other enactments for a like object (y).

Passengers on board ships liable to quarantine must conform with the provisions of the Quarantine Act of 1825 (6 Geo. 4, c. 78), and the Orders in Council made thereunder (z).

Quarantine
regulations.

(x) See *supra*, p. 139.

(y) See also the Petroleum Act, 1871 (34 & 35 Vict. c. 106), the Explosives Act, 1875 (38 Vict. c. 17), and the Petroleum Act, 1879 (42 & 43 Vict. c. 47), and Appendix, "Forms," Nos. 49, 49a, and Orders in Council, pp. 25—29.

(z) See Appendix, "Orders in Council," pp. 84—88, and Supplementary Appendix, pp. 131—136. See also the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 234, Supplementary Appendix, p. 168, and *supra*, p. 149.

Medicines.

The provisions of the Merchant Shipping Act, 1867, with respect to the medicines and medical stores to be carried by all ships navigating between the United Kingdom, and any place out of the same, have been mentioned in a former chapter, as have also the provision of sect. 230 of the Merchant Shipping Act, 1854, which requires that every foreign-going ship having more than one hundred persons or upwards on board shall carry a duly authorized medical officer (s).

**PROVISIONS OF
MERCHANT
SHIPPING ACTS
AND PASSEN-
GERS ACTS
APPLYING TO
SHIPS CARRY-
ING PAS-
SENGERS.**

The statutes now in force with reference to the carrying of boats by ships having passengers on board, to the equipment of steam ships carrying passengers, to the survey of passenger steamers requiring certificates under the Merchant Shipping Acts, or of passenger ships clearing as emigrant passenger ships under the Passengers Acts, and to the conveyance and protection of passengers by sea, are :—

The Merchant Shipping Act, 1854 (Part IV.) (a).

The Passengers Act, 1855 (18 & 19 Vict. c. 119).

The Merchant Shipping Act, 1862.

The Passengers Act, 1863 (26 & 27 Vict. c. 51).

The Passengers Act, 1870 (33 & 34 Vict. c. 95).

The Merchant Shipping Act, 1872.

The Merchant Shipping Act, 1873.

The Merchant Shipping Act, 1876.

Of these acts, the Passengers Acts, 1855 and 1863, though they contain some sections of general application to all ships carrying passengers, or to all ships carrying passengers on certain defined voyages, for the most part apply only to what are known as "emigrant ships" or "emigrant passenger ships," that is to say, such merchant or private passenger ships as are defined in the Passengers Act, 1863, to signify British, colonial, or foreign sea-going vessels carrying upon any voyage from the United Kingdom to any place out of Europe not within the Mediterranean Sea, or upon certain specified colonial voyages (b), more

(s) *Supra*, pp. 205, 207.

(a) Sections 291—328. It is provided that the fourth part of the M. S. Act, 1854, shall apply to all British ships; and that all foreign steamships carrying passengers between places in the United Kingdom shall be subject to all the provisions contained in the fourth part of the act, and likewise

to the same provisions with respect to the certificates of the masters and mates thereof, to which British steamships are subject. The M. S. Act, 1854, s. 291.

(b) See the Passengers Act, 1855, ss. 95, 96, 99 (Appendix, pp. ccviii, ccix), and *infra*, p. 713.

than fifty "passengers" (c), or a greater number of "passengers" than in the proportion of one statute adult (d) to every thirty-three tons of the vessel's registered tonnage if the vessel is a sailing ship, or to every twenty tons if the vessel is a steam vessel (e). On the other hand, the remainder of these acts contain provisions which are principally applicable as well to the particular passenger ships to which the Passengers Act of 1855 applies as to other vessels carrying passengers, whether such vessels be sailing vessels or steamers, British foreign going or home trade passenger steamers, or foreign steamships carrying passengers between places in the United Kingdom. It has therefore been thought advisable, in the present chapter, in the first place to take into consideration those provisions of both the Merchant Shipping Acts and the Passengers Acts, which chiefly have reference to all sailing ships or all steamships, carrying passengers; and then to notice what provisions are to be found in the Merchant Shipping Acts with respect to "passenger steamers" required to be surveyed under the fourth part of the Merchant Shipping Act, 1854, leaving the remainder of the enactments contained in the Passengers Act of 1855, and the Amendment Acts of 1863 and 1870, to be treated of later in the chapter, together with the provisions of those sections of the Merchant Shipping Acts of 1872 and 1876, by which the Passengers Acts have been modified.

It is provided by sect. 292 of Part IV. (sects. 291—328) of the Merchant Shipping Act, 1854, that no decked ship (except ships used only as steam tugs, and ships engaged in the whale fishery) shall proceed to sea from the United Kingdom, unless she is provided with boats duly supplied with all requisites for use, not being fewer in number, nor less in their cubic contents

PROVISIONS OF
MERCHANT
SHIPPING
ACTS APPLYING
TO ALL SHIPS
CARRYING
PASSENGERS.
Rules as to
boats.

(c) The Passengers Act, 1855, and the Passengers Act, 1863, are to be construed as one act (The Passengers Act, 1863, s. 18), and the former act in section 3 provides that the word "passenger," for the purpose of the act, shall include, when not inconsistent with the context or subject-matter, all passengers except cabin passengers as defined by the section, and except labourers under indenture to the Hudson's Bay Company, and their families conveyed in ships, the property of, or

chartered by that company (Appendix, p. cxxliv.) As to this definition, see *Ellis v. Pearce*, 4 Jurist, N. S. 1275; 1 E. B. & E. 431, and *infra*, p. 713.

(d) "Statute adult" is defined (by the Passengers Act, 1855, s. 3) to mean any person aged twelve years or upwards, or two persons between the ages of one and twelve years.

(e) The Passengers Act, 1863, ss. 3, 4 (Appendix, p. cxxliv), the Passengers Act, 1855, s. 3 (Appendix, p. clxxviii), and *infra*, p. 712.

Life-boats
and life-
buoys.

than the boats, the number and contents of which are specified in one of the Tables in the Schedule to the act (*e*). By the same section, a ship which carries more than ten passengers must have one of these boats fitted as a life-boat, or must carry a life-boat in addition. Two life-buoys must also be carried and kept ready for immediate use (*f*).

By sects. 293 and 294, penalties are imposed upon the owner or master if these provisions are not complied with, or if through their wilful default or neglect the boats or buoys are lost or damaged, or not replaced on the first opportunity if accidentally lost or injured in the course of the voyage; and no ship can obtain a clearance or transire unless provided with the required boats and buoys (*g*).

Exemption
from deposit
of shipping
papers
abroad.

Ships, whose business it is for the time being to carry passengers, are exempted from the requirements of the 279th section of the Merchant Shipping Act, 1854, which provides, that all other ships, in whatever part of the Queen's dominions they may be registered, shall, whenever they remain for forty-eight hours at any foreign port where there is a British consul, or at any British colonial port, within forty-eight hours deposit with the consul at such foreign port, or the shipping master at such colonial port respectively, the agreement with the crew, and the indentures of the apprentices on board.

Misconduct
by passengers
on home trade
passenger
ships.

By sect. 325 of the Merchant Shipping Act, 1854, the master of any home trade passenger ship (defined to include every ship trading or going within the following limits,—the United Kingdom, the Channel Islands, and the continent of Europe, between the river Elbe and Brest, inclusive (*h*)) may refuse to

(*e*) See the M. S. Act, 1854, Sched. Table S., Appendix, p. clxi, and Appendix, "Forms," No. 42, p. cccxli. These provisions apply to all British ships and all foreign steam ships carrying passengers between places in the United Kingdom. The M. S. Act, 1854, s. 291. As to a power given to the Board of Trade to modify the provisions of this section in the case of any passenger steamship which has been surveyed under the fourth part of the M. S. Act, 1854, see the M. S. Act, 1873, s. 15, *infra*, p. 705.

(*f*) The M. S. Act, 1854, s. 292, provided that these enactments should not be applicable in any case in which a

certificate had been obtained under the tenth section of the Passengers Act, 1852. This act is now repealed; but the Passengers Act, 1855, contains, in sect. 27, special provisions with reference to the boats to be carried by emigrant passenger ships. See Appendix, "Forms," No. 33, p. cccxxviii, and *infra*, p. 723. See also the M. S. Act, 1876, s. 21.

(*g*) By sect. 15 of the M. S. Act, 1873, the provisions of sect. 293 of the M. S. Act, 1854, are extended to rafts and appliances substituted under that section. See *infra*, p. 704.

(*h*) See M. S. Act, 1854, s. 2.

receive on board any person who by drunkenness or otherwise is in such a state, or so misconducts himself, as to cause annoyance to the other passengers. If such a person is on board he may be landed at any convenient place; and in all these cases the persons offending forfeit any fare which they may have paid (i).

By sect. 300 of the Merchant Shipping Act, 1854, certain rules were laid down with regard to the build of steamships. This section was, however, repealed by the Merchant Shipping Act, 1862 (k), which contains no new provisions on this subject.

Equipment of steamships.

Sect. 301 of the Merchant Shipping Act, 1854, contains provisions for the outfit of steam ships, of which the following is an outline:—

- (1.) All steam ships requiring a survey under the provisions of the act must be provided with a safety valve on each boiler, constructed according to the plan detailed in the act (l).
- (2.) All sea-going steam ships employed to carry passengers must have their compasses properly adjusted from time to time.
- (3.) All sea-going steam ships (unless used solely as tugs), must be provided with a fire hose capable of being connected with the engines.
- (4.) All home-trade steam ships employed to carry passengers by sea must be provided with such shelter for the protection of deck passengers as the Board of Trade may require.

By the same section a penalty not exceeding 100*l.* is imposed upon the owner of every ship that plies or goes to sea without being provided as mentioned above, if the owner appears to have been in fault. The master, if in fault, is liable to a penalty not exceeding 50*l.*

The section further provided in sub-sect. 4 that all sea-going steam ships employed to carry passengers should be provided

(i) The act also contains a general provision imposing a penalty not exceeding 20*l.*, or imprisonment with or without hard labour, for any period not exceeding four weeks, on any person who secretes himself and goes to sea in any ship without the consent of the owner, consignee, master, mate or per-

son in charge or entitled to give such consent. See s. 258.

(k) The M. S. Act, 1862, s. 2, and Sched. Table (A).

(l) See *infra*, p. 704. By s. 302 of this act, heavy penalties are imposed upon persons who place improper weights on the safety valves.

Distress signals, &c.

with proper distress signals, according to rules laid down in the statute; but the sub-section in question is now repealed (*k*), and in lieu thereof sect. 21 of the Merchant Shipping Act, 1876, enacts that every sea-going passenger steamer and every emigrant passenger ship shall be provided to the satisfaction of the Board of Trade—

- (1.) With means for making the signals of distress at night specified in the first schedule to the Merchant Shipping Act, 1873, or in any rules substituted therefor (*k*), including means of making flames on the ship which are inextinguishable in water, or such other means of making signals of distress as the Board of Trade may previously approve (*l*); and
- (2.) With a proper supply of lights inextinguishable in water and fitted for attachment to life-buoys.

By disobedience to these regulations the owner becomes liable to a penalty of 100*l.*, and the master to a penalty of 50*l.*

Carrying of certificated masters and officers.

The provisions of the Merchant Shipping Act, 1854, and the Amendment Act of 1862, which require that foreign-going ships and home trade passenger ships shall not proceed to sea without carrying certificated masters or mates, and, if such ships are propelled by steam, certificated engineers, have been already noticed (*m*), and so have the requirements of the Merchant Shipping Act, 1854, s. 355, under which certain home trade ships carrying passengers are subjected to compulsory pilotage, unless they are navigated by masters or mates having pilotage certificates (*n*).

Compulsory pilotage.

PROVISIONS OF PASSENGER ACTS APPLYING TO ALL SHIPS CARRYING PASSENGERS.

The following are such of the more important provisions of the Passengers Act of 1855, and the Amendment Act of 1863, as apply both to emigrant passenger ships, and also to all other

(*k*) The M. S. Act, 1876, s. 45, and Sched. I. Pt. I.

(*l*) See the M. S. Act, 1873, ss. 18, 20, 21. See also Appendix, p. cccxlv, n. (*d*). A list of the private signals registered under the provisions of the 21st section of the M. S. Act, 1873, which enables shipowners to use for the purposes of a private code any signals so registered, without being liable to the penalties imposed upon persons using or displaying signals of distress improperly, is printed in the Appendix,

"Forms," No. 50, p. cccclxi.

(*m*) See *supra*, pp. 112—115. Foreign steamships carrying passengers between places in the United Kingdom must comply with these provisions, see the M. S. Act, 1854, s. 291.

(*n*) See *supra*, p. 260. Exciseable liquors or tobacco can only be sold on board vessels carrying passengers between places in the United Kingdom under a licence taken out under the 43 & 44 Vict. c. 20, s. 45. See also 9 Geo. 4, c. 47; 4 & 5 Will. 4, c. 75.

ships carrying passengers, on whatever voyages they are bound :—

By sects. 3 and 13 of the Passengers Act, 1855, no ship may carry cabin passengers or passengers other than labourers under indenture to the Hudson's Bay Company, and their families, conveyed in ships the property of or chartered to that company, on more than two decks (*o*). Decks where passengers carried.

By sect. 49 of this act, if any ship, whether an "emigrant passenger ship" or not, does not actually put to sea on the voyage before three in the afternoon of the day after the day of embarkation, every passenger may claim subsistence money at the rate of 1s. 6d. a day for every statute adult for the first ten days, and afterwards at the rate of 3s. a day. This provision does not, however, apply for the first two days after the day of embarkation, if the passengers are maintained on board as if the voyage had commenced. Nor does it apply at all if the detention is unavoidable, owing to the state of the weather, or not the result of any act or default of the owner, charterer, or master (*p*). Subsistence money for passengers.

By sect. 56, no passenger (*q*) in any ship, whether an "emigrant passenger ship" or otherwise, may be landed without his previous consent at any other place than the place at which he has contracted to land, unless the landing is necessary owing to perils of the sea or other unavoidable accident. Disembarkation of passengers.

By sect. 70, a heavy penalty is imposed upon persons who, by false representation as to the size of the ship, or otherwise, Offence of fraudulently inducing to engage passengers.

(*o*) As to the definition of "ship" and "cabin passenger" in this section, see the Passengers Act, 1855, s. 3, and *infra*, p. 711. Cabin passengers, however, in a proportion not exceeding one for every 100 tons, or sick persons placed in hospital, may be carried in a poop or deck-house, notwithstanding that passengers are carried on two other decks (the Passengers Act, 1855, s. 13). By the law of the United States fourteen superficial feet must be allowed for every passenger whose age exceeds one year, if the vessel is not to pass within the tropics. When the height between the decks is less than six feet and more than five, each passenger must be allowed sixteen superficial feet, or if the height is less than five feet, twenty-two superficial feet: for every passenger on the orlop

deck there must be allowed thirty feet. See the evidence taken before the Committee of the House of Commons on the Passengers Act, 1851, p. 5. Penalties are imposed by this act upon persons found on board emigrant passenger ships fraudulently attempting to obtain a passage without the knowledge and consent of the owner, charterer or master; see s. 18; and the limit of these penalties is extended by s. 7 of the Passengers Act, 1863.

(*p*) The emigration officer is to be judge of this. As to the appointment and duties of this officer, see *infra*, p. 714. As to the persons who are included in the term "passengers" as used in this provision, see the Passengers Act, 1855, s. 3.

(*q*) See the Passengers Act, 1855, s. 3.

or by any false pretence or fraud whatever, induce anyone to engage a passage in any ship (*r*).

Recovery of penalties, &c.

Numerous provisions are also contained in the Passengers Act, 1855, for the recovery and application of penalties, for the recovery of passage and subsistence monies and of compensation, and for the protection of persons acting in pursuance of the act (*s*). It is provided also by sect. 94, that where no time is expressly limited within which complaints for any breach of the act are to be made, they must be laid within twelve calendar months from the time when the matter of complaint arose, or, in case the master of the ship is the offender, within the same period after his return to the country in which the cause of complaint arose.

PROVISIONS
RELATING TO
PASSENGER
STEAMERS
REQUIRING
SURVEY UNDER
MERCHANT
SHIPPING
ACTS:

What ships
require sur-
vey, and how
often.

The following regulations are laid down by the Merchant Shipping Acts, with reference to the survey of passenger steamers (defined by sect. 303 of the Merchant Shipping Acts to include every British steamship carrying passengers to, from or between any place or places in the United Kingdom, excepting steam ferry boats working in chains) and of foreign steamships carrying passengers between places in the United Kingdom (*t*). By sect. 304, all such passenger steamers (*u*) were required to be surveyed twice at least in the year. This section is now repealed by the Merchant Shipping Act, 1872, s. 8, which requires a survey once only in every year.

In the case of an emigrant passenger ship within the Passengers Act, 1855, if her hull, machinery and equipments have been surveyed under the provisions of that act a survey in accordance with the Merchant Shipping Act, 1854, is unnecessary (*v*). By sect. 16 of the Merchant Shipping Act, 1876, any steamship may carry passengers not exceeding twelve in number

(*r*) For the meaning of the word "ship" as here used, see the Passengers Act, 1855, s. 3.

(*s*) See ss. 84 to 93. And as to appeal, see *supra*, p. 190. Any emigration officer or other person sued for anything done in pursuance of the act is entitled to ten days' notice of action; the action must, moreover, be commenced within three calendar months after the act complained of; see s. 93.

(*t*) The M. S. Act, 1854, s. 291.

(*u*) For the purpose of these enactments, the word "passengers" includes any persons carried in a steam ship

other than the master or crew, or the owner and his family and servants. See the M. S. Act, 1854, s. 303.

(*v*) The M. S. Act, 1876, s. 18. The salaries of these surveyors and the other expenses connected with the survey of passenger steamers under the 4th part of the M. S. Act, 1854, were formerly charged on the Mercantile Marine Fund (the M. S. Act, 1854, s. 418, subs. 2); but it is now provided that such salaries and expenses shall be paid out of monies to be provided by parliament. (The M. S. Act, 1876, ss. 39, 45, and Schedule, part 2.)

although she has not been surveyed by the Board of Trade as a passenger steamer, and does not carry a Board of Trade certificate as provided by the Merchant Shipping Act, 1854, with respect to passenger steamers.

The Board of Trade has (by sects. 305 to 308 of the Merchant Shipping Act, 1854) power to appoint shipwright and engineer surveyors, for the purpose of carrying out the surveys required by the act. These surveyors are entitled to go on board steamships at all reasonable times, for the purposes of inspection, and must execute their duties under the direction of the Board of Trade (u).

Appointment
and duties of
surveyors.

The Merchant Shipping Act, 1873, s. 15, enacts that in the case of any ship surveyed under the fourth part of the Merchant Shipping Act, 1854, the Board of Trade may at the request of the owner authorize the reduction of the number and the variation of the dimensions of the boats required for the ship by sect. 292 of that act, and also the substitution of rafts or other appliances for saving life for any such boats, so that the boats and rafts or other appliances are sufficient for the persons carried on board the ship (v).

Power of
Board of
Trade to vary
equipment of
passenger
steamers.

By sect. 309, the owners of every passenger steamer must cause her to be surveyed by a shipwright surveyor and an engineer surveyor, and obtain declarations from them giving full particulars, according to the provisions of the act, as to the condition of the ship, and her machinery, appurtenances, and equipments, the time for which, and the local limits (if any) within which they appear to be sufficient, and the number of passengers which the ship appears fit to carry (w).

Surveyors'
declarations.

(u) By s. 321 of the M. S. Act, 1854, these surveyors must, if required to do so, make returns from time to time to the Board as to the build, burthen, rate of sailing, machinery and equipments of the ships surveyed by them, and the owners, masters and engineers of the ships are bound to give them information and assistance in these respects. By sect. 13 of the act of 1872, all duties in relation to survey, &c. under that act are to be performed by the surveyors appointed under the 4th part of the M. S. Act, 1854, in accordance with regulations made by the Board of Trade.

(v) See *supra*, pp. 699, 700.

M.P.

(w) See *post*, Appendix, pp. civ—cv, where the details of these declarations will be found; and *supra*, p. 701, as to the safety valves on board such passenger steamers. The person appointed to make the survey must, if required, be accompanied on the survey by a person appointed by the owner; and if both agree, the owner has no appeal to a Court of Survey on the refusal of a declaration under the Act of 1854. See the M. S. Act, 1876, s. 14, and *infra*, p. 706. By the M. S. Act, 1854, s. 311, the half-yearly surveys must have been made, if possible, in the months of April and October. By s. 34 of the M. S. Act,

Z Z

We have already seen that the Merchant Shipping Act, 1862, renders it necessary that all foreign-going steam ships and home trade passenger steam ships which are required by the Merchant Shipping Act, 1854, to have on board a master possessing a Board of Trade certificate, should also carry a certificated engineer or engineers (*x*); and with reference to these ships, it is provided by sect. 12 of the Merchant Shipping Act, 1862, that the declarations required to be given by engineer surveyors, shall, if the ships have been surveyed under the above enactments, contain a statement, that the engineers' certificates are in the condition required by that act.

Appeal to
Court of
Survey from
refusal of
surveyor's
declaration.

It is provided by the 14th section of the Merchant Shipping Act, 1876, that if a shipowner feels aggrieved—

- (1) By a declaration of a shipwright surveyor or an engineer surveyor respecting a passenger steamer under the above-mentioned provisions of the Merchant Shipping Acts, or by the refusal of a surveyor to give the said declaration; or
- (2) By the refusal of a certificate of clearance for an emigrant passenger ship under the 11th and 50th sections of the Passengers Act, 1855, to be hereafter mentioned,

the owner may appeal to the Court of Survey for the port or district where the ship for the time being is.

The same section provides that on such appeal the judge of the Court of Survey shall report to the Board of Trade on the question raised by the appeal; and that the Board of Trade, when satisfied that the requirements of the report and the other provisions of the said enactments have been complied with, may—

- (1) In the case of a passenger steamer, give their certificate under section 312 of the Merchant Shipping Act, 1854; and
- (2) In the case of an emigrant ship, give, or direct the emigration or other officer to give, a certificate of clearance under the above-mentioned enactments.

1862, this is no longer necessary; but it is provided by that section that no declaration is to be given by any surveyor under Part IV. of the M. S. Act, 1854, for a period exceeding six months, and that no certificate issued by the Board of Trade is to remain in force more than six months from its date. The form of declara-

tion adopted by the Board of Trade (Dec. 1877), in the case of home trade passenger steamers, is set out in a report to the Board of Trade, printed as a parliamentary paper, session 1878, No. 49.

(*x*) *Ante*, pp. 115, 702, and the M. S. Act, 1862, ss. 5—11.

The section further provides that where the survey of a ship is made for the purpose of a declaration or certificate under the provisions above referred to, the person appointed to make the survey shall, if so required by the owner, be accompanied on the survey by some person appointed by the owner; and in such case, if the said two persons agree, there shall be no appeal to the Court of Survey in pursuance of the section (*y*).

When appeal taken away.

The surveyors' declarations above mentioned must (by sect. 310 of the Merchant Shipping Act, 1854) be transmitted by the owners to the Board of Trade within fourteen days of their receipt, and (by sect. 312) the Board may thereupon issue certificates in duplicate stating that these provisions of the act have been duly complied with, and repeating the statements contained in the surveyors' declarations as to the local limits beyond which the ships are not fit to ply, and as to the number of passengers which they are fit to carry (*z*). By sect. 313, the duplicate certificate must be transmitted by the Board to a public officer at a port mentioned for that purpose by the owner, or at the port of survey, or at that at which the owner or his agent resides, from whom the owner, master or agent may upon application obtain the same on payment of the proper fees (*a*). By sect. 315, these certificates cease to be in force on the date fixed by the Board for their expiration, or upon notice given by the Board to the owner, agent or master, that they are cancelled or revoked (*b*). When a certificate expires, however,

Certificates for passenger steamers.

(*y*) The same section provides that, subject to any order made by the judge of the Court of Survey, the costs of and incidental to an appeal under the section shall follow the event; and that, subject to any order of the Court to the contrary, the provisions of the act with respect to the Court of Survey and appeals thereto, so far as consistent with the tenour thereof, shall apply to the Court of Survey when acting under the section, and to appeals under this section. See *supra*, pp. 33—36, where the constitution and the procedure of the Courts of Survey is discussed.

(*z*) Forms of passenger certificates in use for foreign-going and home trade passenger steamers, are printed in the Appendix, "Forms," Nos. 29 and 30, pp. ccccxv, ccccxvii.

(*a*) See as to these fees, M. S. Act,

1854, s. 314, and Table (T.) in the Schedule to the act; M. S. Act, 1872, s. 8; M. S. Act, 1873, s. 30; and Appendix, "Forms," No. 55. The fees are to continue to be paid to a mercantile marine superintendent at such times and in such manner as the Board of Trade may direct, and be carried to and form part of the consolidated fund. M. S. Act, 1876, s. 39.

(*b*) The Board may revoke or cancel any certificate whenever it has reason to believe that the declarations have been fraudulently or erroneously made, or issued on false or erroneous information, or that, since they were made, the ship, machinery, or equipments have sustained any injury, or are otherwise insufficient. In these cases a new survey may be insisted on by the Board. See M. S. Act, 1854, s. 316.

during the absence of a passenger steamer from the United Kingdom, no penalty is incurred for want of it until the ship first begins to ply with passengers after her next subsequent return. A copy of the certificate must (sect. 317) be put up and kept up, as long as it remains in force, in some conspicuous part of the vessel.

Heavy penalties are incurred under these sections of the act, and under sections 319 and 320, if more passengers are received on board than the number allowed by the certificate; if these regulations are in any other respect infringed; or if any forgery or fraud is committed with respect to the declarations and certificates.

Granted by
colonial
governments.

The 17th and 19th sections of the Merchant Shipping Act, 1876, contain the following provisions with respect to colonial certificates for passenger steamers and the survey of foreign passenger steamers or emigrant passenger ships.

The 17th section of the act provides that where the legislature of any British possession provides for the survey of, and grant of certificates for passenger steamers, and the Board of Trade report to her Majesty that they are satisfied that the certificates are to the like effect and are granted after a like survey, and in such manner as to be equally efficient with the certificates granted for the same purpose in the United Kingdom under the acts relating to merchant shipping, her Majesty by Order in Council may declare that the said certificates shall be of the same force as if they had been granted under the said acts, and that all or any of the provisions of the said acts which relate to certificates granted for passenger steamers under those acts, shall either with or without modification apply to the certificates referred to in the order; and may impose such conditions and make such regulations with respect to the said certificates, and to the use, delivery, and cancellation thereof, as to her Majesty may seem fit, and impose penalties not exceeding 50*l.* for the breach of such conditions and regulations (c).

By foreign
authorities.

The 19th section of the same act provides that where a foreign ship is a passenger steamer subject to the Merchant Shipping

(c) An Order in Council, under this section, has recently been issued with respect to colonial certificates granted

by the legislature of Bombay. See Supplementary Appendix, p. 188.

Acts, or an emigrant passenger ship subject to the Passengers Acts, and the Board of Trade are satisfied by the production of a foreign certificate of survey attested by a British consular officer at the port of survey, that such ship has been officially surveyed at a foreign port and that the requirements of the said acts or any of them are proved by such survey to have been substantially complied with, the Board may, if they think fit, dispense with any further survey of the ship in respect of the requirements so complied with, and give or direct one of their officers to give a certificate which shall have the same effect as if given upon survey under the said acts or any of them (*d*).

No passenger steamer except a passenger steamer which is also an emigrant passenger ship, and has complied with the requirements of the Passengers Acts with respect to the survey of her hull, equipments, and machinery as hereinafter mentioned (*e*), and no foreign steamship carrying passengers between places in the United Kingdom, may clear out or proceed to sea, or on any voyage or excursion with more than twelve passengers on board unless the provisions of the above-mentioned sections of the Merchant Shipping Acts of 1854 and 1876, with respect to survey, surveyors' declarations, and passenger certificates, have been in all respects complied with (*f*).

Prohibition of passenger steamers proceeding to sea without passenger certificates.

By the Merchant Shipping Act, 1854, sects. 322 and 323, rules were laid down to prevent misconduct by passengers, the overcrowding of steamers and the evading of fares. These sections were, however, repealed by the Merchant Shipping Act, 1862 (*g*), which has substituted the following provisions.

Misconduct by passengers in passenger steamers.

By sect. 35 of that act, penalties are imposed on—

- (1.) Any person who, being drunken or disorderly, has been on that account refused admission into any duly surveyed passenger steamer by the owner or any person in his employment, and who, after having had the amount of his fare (if he has paid it) returned or tendered to him, nevertheless persists in attempting to enter the steamer;

(*d*) The section further provides, that her Majesty may, by Order in Council, direct that this section shall not apply in the case of an official survey at any foreign port at which it appears to her Majesty that corresponding privileges are not extended

to British ships.

(*e*) See *infra*, p. 721.

(*f*) The M. S. Act, 1854, ss. 291, 303, 318; the M. S. Act, 1876, ss. 16, 18.

(*g*) The M. S. Act, 1862, s. 2, and Schedule, Table (A).

- (2.) Any person who, being drunken or disorderly on board any such steamer is requested by the owner or any person in his employment to leave it at any place in the United Kingdom at which he can conveniently do so, and who, having had the amount of his fare (if he has paid it) returned or tendered to him, refuses to comply with such request;
- (3.) Any person on board any such steamer who, after warning by the master or any other officer, molests or continues to molest any passenger;
- (4.) Any person who, after having been refused admission into any such steamer by the owner or any person in his employment on account of the steamer being full, and who after having had the full amount of his fare (if he has paid it) returned or tendered to him, nevertheless persists in attempting to enter the ship;
- (5.) Any person, having got on board any such steamer, who, upon being requested on the like account by the owner or any person in his employment to leave the steamer before it has quitted the place at which he got on board, and who, upon having the full amount of his fare (if he has paid it) returned or tendered to him, refuses to comply with the request;
- (6.) Any person who travels or attempts to travel in any such steamer without having previously paid his fare, and with intent to avoid payment of it;
- (7.) Any person who, having paid his fare for a certain distance, knowingly and wilfully proceeds in any such steamer beyond this distance without previously paying the additional fare, and with intent to avoid payment of it;
- (8.) Any person who knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit the steamer; and
- (9.) Any person on board any such steamer who does not when required by the master or other officer either pay his fare, or exhibit the ticket or other receipt (if any), showing the payment of the fare which is usually given to persons travelling by and paying their fare for the steamer (i).

(i) The recovery of the fare is not to be prejudiced by the imposition of any

penalty under this section. The M. S. Act, 1862, s. 35.

By sect. 36 of the same act it is provided, that any person on board any such steamer who wilfully does or causes to be done anything in such a manner as to obstruct or injure any part of the machinery or tackle of the steamer, or to obstruct, impede or molest any of the crew in the navigation or management of the steamer, or otherwise in the execution of their duty, shall be liable to a penalty not exceeding 20*l*.

Wilful injuries by passengers in passenger steamers.

And by sect. 37, the master or other officer of any duly surveyed passenger steamer, and all persons called by him to his assistance, may detain any person who has committed any offence against any of these provisions, and whose name and address are unknown to the officer, and convey him with all convenient despatch before a justice without warrant (*k*).

Apprehension of offenders.

The principal acts now in force relating to emigration, to passenger ships bound to any place out of Europe not within the Mediterranean, and to "emigrant passenger ships" (*l*), are the Passengers Act, 1855, the Passengers Act, 1863, the Passengers Act, 1870, and the Merchant Shipping Act, 1872, of which last act the full title is "An Act to amend the Merchant Shipping Acts and the Passenger Acts." The first of these acts consolidated many of the provisions of the law on this subject, and came into operation on the 1st October, 1855. The second, which amended the first and is to be construed with it, came into operation on the 1st October, 1863 (*m*).

PROVISIONS OF PASSENGER ACTS RELATING TO EMIGRATION AND PARTICULAR PASSENGER SHIPS.

The provisions of the Passengers Act, 1855, applied to all passengers except cabin passengers, and labourers under indenture to the Hudson's Bay Company carried in that company's ships. This act provided that no persons should be deemed to be cabin passengers unless the space allotted to their exclusive use was in the proportion of at least thirty-six clear square feet to each passenger of the age of twelve or upwards, nor unless they were messed throughout the voyage at the same table with the master or first officer of the ship, nor unless the fare contracted to be paid by each was in the proportion of at least 30*s*. for every week of the length of the voyage as computed for

Application of Passengers Acts.

To what passengers.

(*k*) The magistrate is empowered to try and dispose of the case with all convenient despatch. The M. S. Act, 1862, s. 37.

(*l*) See *supra*, p. 698.

(*m*) The Passengers Act, 1855, s. 1;

the Passengers Act, 1863, s. 2. See these acts, Appendix, pp. clxxvii, cxliv. The first of them repealed, from the date of its coming into operation, the Passengers Act then in force (15 & 16 Vict. c. 44).

sailing vessels proceeding south of the equator under the provisions of the act, and of 20s. for vessels proceeding north of the equator, nor unless they were duly furnished with contract tickets according to the provisions of the act (*n*). Most of the provisions of the Passengers Act, 1855, do not apply to cabin passengers, but we shall see that a few of them have been extended to certain passengers of this class by the Passengers Act, 1863 (*o*).

To what ships.

The Passengers Acts do not extend to Queen's ships, or to ships in the service of the Admiralty, but, as has been already noticed, their provisions chiefly apply (*p*) to "emigrant passenger ships," that is, to every description of sea-going vessel, whether British, or foreign or colonial, carrying on any voyage from the United Kingdom to any place out of Europe, and not in the Mediterranean Sea, or on certain colonial voyages described in the act (*q*), more than fifty "passengers" (*r*), or a greater number of "passengers" when the ship is propelled by sails, than in the proportion of one statute adult (that is, one person of the age of twelve or upwards, or two persons between the ages of one and twelve) to every thirty-three tons of the registered tonnage, or, when the ship is propelled by steam, a greater number than in the proportion of one statute adult to every twenty tons registered tonnage (*s*). It was held that a sailing ship was not

(*n*) The Passengers Act, 1855, s. 3. Before the passing of the earlier Passengers Act (15 & 16 Vict. c. 44), there was no statutory definition of a *cabin passenger*, and doubts had been entertained as to the precise meaning of the term. The object of the description mentioned above was to exclude from the term *cabin passengers*, and to include clearly within the protection of the act, a class of passengers frequently carried in steam vessels, and called *intermediate passengers*. These are, in fact, steerage passengers who are berthed in cabins, or in enclosed berths screened off by canvas, or wooden bulkheads. See the proceedings of the Committee of the House of Commons on the Passengers Act, 1851.

(*o*) See ss. 4, 6, 11 and 15.

(*p*) See *supra*, p. 698. See also sects. 3 and 4 of the Passengers Act, 1855, and sect. 4 of the Passengers Act, 1863. Ships of war and transports in the service of the East India Company, and steamers carrying mails

under contract with the government of the state or colony to which the vessels belonged, were also exempted from the operation of the earlier act by the Passengers Act, 1855, s. 4. The latter class of vessels has ceased now to exist, and the exemption of steamers carrying mails has been repealed by sect. 4 of the Passengers Act, 1863.

(*q*) See the Passengers Act, 1855, s. 95; see also *ib.* ss. 96—99; and *infra*, p. 713.

(*r*) See *supra*, p. 711, as to the meaning of "passengers" as here used.

(*s*) See *supra*, p. 698. The definition of an "emigrant passenger ship," which is given above, is that contained in sect. 3 of the Passengers Act, 1863, which repeals the definition given by sect. 3 of the Passengers Act, 1855. These "emigrant passenger ships" are invariably referred to throughout the Passengers Act, 1855, and the Amendment Act of 1863, as "*passenger ships*."

"a passenger ship" within the meaning of the Passengers Act, 1855, that is, an emigrant passenger ship, because she carried more than the number of passengers mentioned in that act, if that number or proportion could not be made up without reckoning cabin passengers, even although those persons had not received contract tickets; for the provisions of that act with reference to contract tickets for cabin passengers are only applicable in the case of emigrant passenger ships, and the non-delivery of the tickets on board a ship that is not a passenger ship does not render it necessary to count the cabin passengers as steerage passengers (*t*).

Some of the provisions of the Passengers Act, 1855, apply, as we have already seen, to all ships carrying passengers, whether they are or are not "emigrant passenger ships" within the above description (*u*), but these provisions of the Acts of 1855 and 1863 which we have now to mention (with the exception of a few provisions referring to ships carrying passengers on particular colonial voyages (*v*); or to vessels bringing passengers *into* the United Kingdom from places out of Europe (*x*)), either apply only to emigrant passenger ships and ships carrying passengers to places out of Europe not within the Mediterranean (*y*), or exclusively to emigrant passenger ships.

It is not necessary to consider in detail the provisions of the Passengers Act, 1855, as to colonial voyages. They are for the most part contained in sects. 95 to 99, and are chiefly applicable to voyages from ports in the colonies, other than the territories formerly under the government of the East India Company and the island of Hong Kong. Power is, however, given to the Governor-General of India in Council to adopt, where it may be thought expedient, the system established by the act (*z*). By the 24 & 25 Vict. c. 52, the governors of the Australian colonies may prescribe by proclamation rules as to the number of passengers to be carried by passenger ships from one part of Australia to another part, and for determining on

To what colonial voyages.

(*t*) See *Ellis v. Pearce*, 1 E. B. & E. 431.

(*u*) *Supra*, p. 702. See ss. 10, 13, 49, 56, and 70 of the Passengers Act, 1855. See also s. 58.

(*v*) See the Passengers Act, 1855, ss. 95—99.

(*x*) The Passengers Act, 1855, ss.

100—102; and *infra*, p. 718.

(*y*) The Passengers Act, 1855, ss. 16, 17, 48. See also ss. 53, 67, 69, 71—74; and *infra*, p. 714.

(*z*) Sect. 99. Emigration from British India is regulated by the Indian Act, No. XIII. of 1864, which consolidated some sixteen acts.

what deck, and subject to what remuneration, and conditions, passengers may be carried. While such proclamation is in force, the rules contained in the Imperial act are to cease to apply to vessels to which the proclamation is applicable.

By what authority carried out.

The Colonial Land and Emigration Commissioners were empowered to carry the Passenger Acts into execution(*a*); but their powers under such acts are now transferred to the Board of Trade(*b*).

Duties of emigration officers.

The appointment of emigration officers, for the purpose of carrying the Passengers Act, 1855, into execution, is provided for by the 8th section of that act; and it is further provided by sect. 9, that the functions and duties of these officers may be performed by an assistant; and at any port where there is no such assistant, or in his absence, by the chief officer of customs at such port(*c*).

Power of to inspect passenger ships.

By sect. 10 of the same act, the masters of all ships, whether emigrant passenger ships, or otherwise fitting or intended for the carriage of passengers, or which shall carry passengers on any voyage to which the act extends(*d*) are bound to afford to the emigration officers within the British dominions every facility for inspecting the ships and communicating with their passengers, and for ascertaining that the act has been complied with. In the case of British ships the same facilities must also be afforded to the British consular authorities abroad.

PROVISIONS RELATING TO EMIGRANT PASSENGER SHIPS AND SHIPS CARRYING PASSENGERS OUT OF EUROPE BEYOND THE MEDITERRANEAN.

The following sections of the Passengers Act, 1854, and the Amendment Act of 1863, relate to emigrant passenger ships(*e*), and to other ships carrying passengers(*f*) out of the United Kingdom to any place out of Europe not within the Mediterranean Sea, or on any colonial voyage to which the acts extend; to the rights of passengers who have taken passages on board

(*a*) By the Passengers Act, 1855, ss. 6—9, Memoranda were issued in March, 1856, and in April, 1864, by the commissioners, containing instructions for the guidance of their officers in carrying into effect the provisions of these acts. *Id.* The Board of Trade re-issued these memoranda with some alterations in 1875.

(*b*) The M. S. Act, 1872, s. 5; and see the M. S. Act, 1876, s. 20, *infra*, p. 722, enabling the Board of Trade to

modify the provisions of the Passengers Acts with respect to the matters referred to in that section.

(*c*) The appointment of emigration officers is now made by the Board of Trade. See the M. S. Act, 1872, s. 5. As to the powers of these officers, see also *supra*, p. 703, note (*p*), and *infra*, p. 722.

(*d*) See *supra*, p. 712.

(*e*) See *supra*, p. 698.

(*f*) See *supra*, p. 711.

such ships (*g*), and to the licensing and duties of "passage brokers" employed in the sale or letting of passages to any place out of Europe, not being in the Mediterranean Sea (*h*).

By sects. 16 and 17 of the Passengers Act, 1855, the master of every ship carrying passengers on any voyage from the United Kingdom to any place out of Europe, and not within the Mediterranean Sea, or on any colonial voyage, to which these acts extend must, before clearance, sign two lists in a form prescribed by the acts, stating, amongst other things, the name and tonnage of the ship, and giving the names and descriptions of the passengers, with the amount of space allowed to them. Additional lists must be signed if additional passengers are taken on board. These lists must be countersigned by an emigration officer, and delivered by the master to the officer of customs from whom a clearance is demanded; or, in the case of additional lists, to the officer of customs at the place at which the additional passengers are taken on board, or at the next port at which the ship may touch where there is an officer of customs. One of the lists, called the "master's list," must be countersigned by the officer of customs, and returned to the master, who is bound to keep it, and to produce it to the British local authorities at any port at which he may land any passenger; and, finally, it must be deposited with the chief officer of customs, or with the consul at the port of discharge (*i*).

Lists of passengers.

Additional lists before sailing.

By sect. 6 of the Passengers Act, 1863, it is further provided, that these lists must contain the names of all the cabin passengers on board, specifying whether they are under or over twelve years of age, and at what place the passengers and cabin passengers are to be landed (*k*).

Lists of cabin passengers.

Heavy penalties are imposed by these sections on masters who disregard their provisions.

Under the provisions of the Passengers Act, 1855, s. 71, and of the Merchant Shipping Act, 1872, s. 5, heavy penalties are incurred by every person whatever, except the Board of Trade

Contract tickets.

(*g*) *Infra*, pp. 715, 716.

(*h*) See *infra*, p. 717.

(*i*) See *post*, Appendix, p. cccxxi, for the form of these lists. Whenever any additional passenger is taken on board the master must obtain a fresh certificate from the emigration officer

that all the requirements of the act have been duly complied with. The Passengers Act, 1855, s. 17.

(*k*) As to the registration of births and deaths which occur during a voyage, see Chap. III. "MASTERS," *ante*, p. 151.

and persons acting for them and under their authority who receive any money in respect of a passage in any ship, or a cabin passage in any emigrant passenger ship (*m*), proceeding from the United Kingdom to any place out of Europe not within the Mediterranean, without giving in exchange a contract ticket, in a form directed by the act. These tickets (of which two forms are given by the statute, one of which is applicable to cabin passengers) must state, amongst other things, the amount of the passage money, the register burden of the ship, the day appointed for sailing, and the statutory victualling scale which it is intended to adopt. They must also contain an acknowledgment of the amount of passage money which has been paid, and an engagement that the persons named in them shall be provided with a passage in the ship, and to the port mentioned in the tickets (*n*). By sect. 72, persons who alter, or cause to be altered, any contract ticket, or induce any one to part with, or to destroy or render it useless during the continuance of the contract, are liable to a penalty. By sect. 73 of this act, any question which may arise respecting the breach of any of the stipulations in a contract ticket may, at the option of the passenger, be heard and determined in a summary way before justices (*o*).

Summary
remedy on.

Common law
remedies pre-
served.

By sect. 58, nothing in the act is to abridge or take away any right of action which may accrue to any passenger in any ship, or to any other person, in respect of the breach or non-performance of any contract with the master, charterer, or owner of any ship, or their agent, or any passage broker. It is also provided by sect. 65, that in the absence of any agreement to the contrary, the owner is to be the party ultimately responsible as between himself and the other persons made liable by the act in respect of any disobedience to its provisions; and that these last-mentioned persons shall be entitled, in the event of their

(*m*) See *supra*, pp. 710, 711, and *Ellis v. Pearce*, 1 E. B. & E. 431.

(*n*) As to how far these provisions extend to passages for any colonial voyage within the act, see the Passengers Act, 1855, ss. 95—99. See the forms of these tickets, Appendix, "Forms," No. 32, pp. cccxxv, cccxxvi. They are not liable to stamp duty. The Board of Trade may vary the forms from time to time. All directions contained on the face of the tickets must

be obeyed as if set forth in the statute; see s. 71. Passengers are bound to produce their tickets on demand to any emigration officer in the United Kingdom, s. 74.

(*o*) The amount awarded must not exceed the passage money and 20*l*.; and no passenger can use this summary remedy if he has obtained compensation or redress under any of the other provisions of the act; see s. 73.

paying to any passengers any sums of money payable under the act, to recover the same with costs from the owner, in the absence of any such agreement.

The important provisions with reference to passage brokers and their agents contained in the Passengers Act, 1855, are to the following effect :—

By sect. 66, read with the Merchant Shipping Act, 1872, Passage
brokers.
s. 5, no person, except the Board of Trade, and persons contracting with the Board, or acting under its authority, and persons acting as agents of passage brokers under a form of appointment prescribed by the act, may directly or indirectly act as a passage broker, in respect of passages from the United Kingdom to any place out of Europe, and not on the Mediterranean, or sell or let, or agree to sell or let, or be concerned in the sale or letting of these passages in any ship, whether a "passenger ship" or not, until he has, with two sureties, entered into a bond to the Crown conditioned for the observance of all the regulations of the act, and has also obtained a licence (p).

By sect. 48 of the Passengers Act, 1855, if any persons on whose behalf a contract has been made for a passage in a ship proceeding on a voyage to which the act extends, are at the place of embarkation before six in the afternoon of the day of embarkation, and, if (being required to do so) they pay the passage money, or the balance, but from any cause other than their own refusal, neglect, or default, or the prohibition of an emigration officer, or the requirements of an Order in Council, they are not received on board before that hour, or if from any of the causes above mentioned any passengers who have been received on board do not obtain a passage in the ship to the port contracted for, or do not, with their families (if included in the contract), obtain a passage to that port in some equally eligible ship, to sail within ten days from the day of embarkation, being in the meantime paid subsistence money, they are

Rights of
passengers
when left
behind.

(p) As to how far these provisions apply in respect of passages for any colonial voyage within the act, see the Passengers Act, 1855, ss. 95—99. See the form of this bond, Appendix, "Forms," No. 32, p. ccccxii. It must be executed in duplicate and does not require a stamp. Sworn brokers of the city of London are not required to enter into these bonds, s. 66. See the London Brokers Re-

lief Act, 1870 (33 & 34 Vict. c. 60). The licences must be renewed annually. See s. 67. The form of the licence, and the form of appointment of a passage broker's agent will be found in the Appendix, "Forms," No. 32, pp. ccccxiii, ccccxiv. No passage broker may employ as agent in his business any person not holding from him such an appointment. See s. 69.

entitled to recover summarily all the passage money which they have paid, either from the person to whom or on whose account it has been paid, or (if the contract has been made with the owner, charterer, or master, or with any one acting for them), from either the owner, charterer, or master, at the option of the passenger or of the emigration officer. They are also entitled in these cases to compensation for the loss and inconvenience incurred (*p*).

PROVISIONS
RELATING TO
IMMIGRANT
PASSENGER
SHIPS.

The following important provisions are contained in the Passengers Act, 1855, with respect to vessels bringing passengers into the United Kingdom. These regulations are intended to compel the adoption by foreign vessels (*q*), and by vessels returning to our ports, of the more important parts of the system established by the act. Thus, by sect. 100, the master of every ship bringing passengers into the United Kingdom from any place out of Europe and not within the Mediterranean Sea must, within twenty-four hours after arrival, deliver to the emigration officer, or in his absence to the chief officer of customs, at the port of arrival, a signed list, showing correctly the names, ages, and callings of all the passengers taken on board, and the ports at which they have been embarked, and mentioning any deaths (with their supposed cause) and any births among them during the voyage (*r*). And by sects. 101 and 102, the master of every ship, bringing passengers into the United Kingdom from any place out of Europe, is liable to heavy penalties if he has on board a greater number of passengers or persons than is allowed by the act in the case of emigrant passenger ships carrying passengers from the United Kingdom (*s*); and he is also bound, during the voyage, to provide

(*p*) The language of one of the earlier acts, the 12 & 13 Vict. c. 32 (an act for the carriage of passengers in merchant vessels), ss. 32 and 33, was ambiguous, and doubts had been entertained as to whether the liability to refund the passage money was not restricted to the party to whom it had been paid, or with whom the contract had been actually made. The words in the present act were used for the purpose of giving a remedy in the alternative. The ultimate liability is, however, thrown on the owners, unless there be any agreement to the contrary; see s. 65 of the Passengers Act, 1855.

(*q*) We have already seen (*ante*, p.

712), that the definition of a "passenger ship" which is now in force, includes all sea-going vessels whether British or foreign, carrying on any voyage to which the Passengers Act, 1855, extends more than a certain number of passengers. See the Passengers Act, 1863, s. 3; and *supra*, p. 712.

(*r*) As to the duty of the master with respect to the registration of births and deaths, and the delivery of a list of alien passengers to the customs, see *ante*, pp. 150—152; and Supplementary Appendix, p. 138.

(*s*) See the Passengers Act, 1855, s. 14; and *infra*, p. 720.

each statute adult with pure water and wholesome provisions, in quantities not less in amount than those which must be issued to passengers proceeding from the United Kingdom (*t*).

With the exception of the three last-mentioned sections of the Passengers Act, 1855, and the provisions of that act relating to colonial voyages (*u*), all the provisions contained in such of the sections of that act as have been already referred to extend to "emigrant passenger ships" as well as to the other ships to which they are respectively applicable, but those provisions of the act which we must now notice have reference exclusively to emigration and "emigrant passenger ships" (*r*).

PROVISIONS
SOLELY
RELATING TO
EMIGRATION
AND EMIGRANT
PASSENGER
SHIPS.

The following statutory regulations with respect to emigrant runners (*w*) are contained in the Passengers Act, 1855. By sect. 75, no person may act as emigrant runner without being licensed and registered, and every runner must, while acting, wear a badge. The magistrates of any district may (by sect. 76) license persons recommended in writing by an emigration officer, or by the chief constable or head officer of police, to act as runners. These licences are registered by the nearest emigration officer, and must (by sect. 77) be renewed annually (*x*). Every runner must (by sect. 78) produce his badge for inspection on demand; and he must if he changes his place of abode give notice to the emigration officer of the place where he is licensed (*y*); and it is provided by sect. 80, that no runner shall be entitled to recover from any passage broker any fee, commission, or reward for services connected with emigration, unless he acted under the written authority of the passage

Emigrant
runners.

(*t*) See *infra*, pp. 733—735.

(*u*) See *supra*, p. 714.

(*v*) See *supra*, pp. 712, 713, as to what ships are emigrant passenger ships, that is to say, "passenger ships" within the meaning of those words as used in the act.

(*w*) See the Passengers Act, 1855, s. 3, as to the meaning of "emigrant runner" when used in the act.

(*x*) By sect. 81 lists of the runners and of the persons authorized to act as agents of passage brokers, must be exhibited in the offices of the brokers, and sent to the emigration officers. These provisions, and those of the earlier acts in this respect, were intended to check the gross abuses of the system of "emigrant runners," who interposed between the emigrants and the passage

brokers (often without authority), and extorted from the brokers a large per centage on the passage money, which became indirectly a charge on the emigrants by raising the rate of the passage money. In Liverpool this per centage has amounted to 7½ per cent. See the Report of the Committee of the House of Commons on the Passengers Acts, Aug. 2nd, 1851.

(*y*) The statute imposes penalties on any persons who mutilate or deface their badges, or wear them when unlicensed, or wear any badge not belonging to them, or permit others to do so. New badges may be issued by the emigration officers if they are satisfied that the old ones are lost, or they are delivered up in a mutilated or defaced state. See ss. 78 and 79.

broker; nor may he take or demand from any person about to emigrate any fee or reward for procuring the passage or in any way relating thereto.

Bye-laws as to landing and embarkation of emigrants.

This act also enables the trustees of docks from which emigrant passenger ships are despatched to make bye-laws, subject to the approval of the Secretary of State, for the regulation of the landing and embarkation of emigrants, and for licensing porters to attend upon them, and for storing their luggage, and admitting persons to or excluding them from the docks (z).

Provisions relating to emigrant passenger ships before clearance.

The following are the rules laid down by the Passengers Act, 1855, as modified by the Passengers Act, 1863, for determining the number of passengers that may be carried in any "emigrant passenger ship" (a).

Number of passengers in emigrant passenger ships.

By sect. 14 of the Passengers Act, 1855, no "emigrant passenger ship" may carry under the poop, or in the round-house, or deck-house, or on the upper passenger deck (b), a greater number of passengers than in the proportion of one statute adult to every fifteen clear superficial feet of deck allotted to their use. No ship may carry on her lower passenger deck (c) a greater number of passengers than in the proportion of one statute adult to every eighteen clear superficial feet of deck allotted to their use: and if the height between the lower passenger deck and the deck immediately above it is less than seven feet, or if the apertures (exclusive of side scuttles) through which light and air are admitted together to the lower passenger deck are less in size than in the proportion of three square feet to every one hundred superficial feet of the lower passenger deck, no greater number of passengers may be carried on this

(z) Sect. 82. By s. 83, penalties are imposed upon persons falsifying or forging documents, or assuming to act as agents of the emigration commissioners, or personating persons named in any of the emigration documents. See the M. S. Act, 1872, s. 5.

(a) See *supra*, pp. 712, 713.

(b) This term means "the deck immediately beneath the upper deck, or the poop, or round-house, and deck-house when the number of passengers and cabin passengers carried in the poop, round-house, or deck-house exceeds one-third of the total number of passengers which such ship can law-

fully carry on the deck next below." See sect. 3 of the Passengers Act, 1855. As to a general provision that no ship is to carry passengers on more than two decks, see the Passengers Act, 1855, s. 13, and *supra*, p. 703, and p. 703, note (c). The 18th section of the Passengers Act, 1855, and the 7th section of the Passengers Act, 1863, impose penalties upon persons fraudulently attempting to obtain passages.

(c) This term is defined by s. 3 of the Passengers Act, 1855, to mean the deck next beneath the upper passenger deck, not being an orlop deck.

deck than in the proportion of one statute adult to every twenty-five clear superficial feet of it. No ship, whatever be her tonnage or superficial space of passengers' decks, may carry a greater number of passengers on the whole than in the proportion of one statute adult to every five superficial feet, clear for exercise, on the upper deck or poop, or (if secured and fitted on the top with a railing or guard to the satisfaction of the emigration officer at the port of clearance) on any round-house or deck-house (*d*).

By sect. 19 of the Passengers Act, 1855, as amended by sects. 5 and 13 of the Merchant Shipping Act, 1872, it is provided that, no "emigrant passenger ship" shall clear out or proceed to sea until she has been surveyed under the direction of the emigration officer at the port of clearance by the surveyors of the Board of Trade (*e*), but at the owners or charterers' expense, and has been reported to be seaworthy and fit in all respects for the intended voyage (*f*). It is, however, now provided, that

Survey and inspection of such ships.

(*d*) It was also provided by this section that no emigrant passenger ship propelled by sails should carry more persons (including every individual on board) than in the proportion of one statute adult to every two tons of her registered tonnage; but this rule was repealed by s. 5 of the Passengers Act, 1863, except so far as relates to penalties incurred or legal proceedings taken under it.

The section further provides that in measuring the passenger decks, round-house or deck-house, the space for the hospital and that occupied by the personal luggage of the passengers is to be included. The provisions of the section are made applicable, by s. 101 of the Passengers Act, 1855, to ships bringing passengers into the United Kingdom from places out of Europe. By this section a penalty not exceeding 10*l*., nor less than 5*l*., in respect of every person or statute adult constituting the excess, is imposed upon the master of any ship bringing from a place out of Europe into the United Kingdom a greater number of passengers or persons than is allowed by the unrepealed portions of the Passengers Act, 1855, s. 14. A power is given to the Queen by Order in Council to reduce the number of passengers allowed to be carried under these sections. See the Passengers Act, 1855, s. 59, and *infra*, p. 732. These pro-

visions with reference to the space to be allotted to passengers may, in the case of ships carrying natives of Asia and Africa from an English colony, and intended to pass within the tropics, be modified by proclamation of the colonial government. See the 16 & 17 Vict. c. 84, the operation of which is saved by the Passengers Act, 1855, s. 15. See also the 24 & 25 Vict. c. 52, s. 1, and *ante*, p. 714; the 18 & 19 Vict. c. 104, "An Act for the Regulation of Chinese Passenger Ships," which last act regulates the conveyance of emigrants from ports in the Chinese seas, and the 35 & 36 Vict. c. 19, and 38 & 39 Vict. c. 51, as to the carriage by sea of natives of the Islands of the Pacific Ocean.

(*e*) See the M. S. Act, 1873, s. 13.

(*f*) If required, the person appointed to make the survey must be accompanied on the survey by a person appointed by the owner. See the M. S. Act, 1876, s. 14, and *ante*, p. 707. The survey is to be made before the cargo is put on board. The owner or charterer, if dissatisfied with the report of the surveyors, may require the emigration officer or chief officer of customs to appoint three other surveyors to survey the ship again at his expense. If they report unanimously that the ship is seaworthy and fit for the voyage she is to be deemed to be so for the purposes of the Passen-

where a passenger certificate has been granted to a steamer under the 4th Part of the Merchant Shipping Act, 1854, and remains in force, a survey of her hull and machinery under the Passengers Act, 1855, is unnecessary (*g*). Where, also, a foreign ship is an emigrant passenger steamer, and the Board of Trade are satisfied that the ship has been officially surveyed at a foreign port, and that the requirements of the Passengers Acts are proved by a foreign certificate of survey to have been substantially complied with, any further survey may be dispensed with (*h*).

General
power of
Board of
Trade.

By the Merchant Shipping Act, 1876, s. 20, power is given to the Board of Trade, if satisfied that the food, space, accommodation, or any other particular or thing provided in an emigrant passenger ship for any class of passengers, is superior to what is required by the Passengers Act, 1855, and the acts amending the same, to exempt such ship from any of the requirements of those acts with respect to these matters in such manner and upon such conditions as they may think fit.

Requirements
on survey.

By sects. 20 to 23 of the Passengers Act, 1855, the decks in every "emigrant passenger ship" must be strongly and firmly constructed, in a manner pointed out in the act, and to the satisfaction of the emigration officer at the port of clearance, and there must be a height of six feet between them. The berths must be of specified dimensions, securely constructed, and not overcrowded; the single men must be berthed in a separate compartment of the ship or in separate rooms; no more than one person (unless in the case of married persons, or women and children under twelve) may be placed in the same berth; and no berths which have been occupied may be taken down within forty-eight hours after the arrival of the ship at her port

Construction
of decks and
space to be
allowed.

gers Act, 1855. See also s. 11 of the Passengers Act, 1855, and *infra*, p. 731, as to the certificate of clearance for the ship and the appeal to a Court of Survey in certain cases where it is refused. If any passenger ship touches at a port in the United Kingdom after having sustained any damage, she must be effectually repaired, and a certificate of seaworthiness and fitness must be obtained before she can sail again. See s. 50. As to the fees chargeable by the surveyors, which are to be paid to

a mercantile marine superintendent, and to be carried to the Consolidated Fund, see the M. S. Act, 1872, s. 15, and the M. S. Act, 1873, s. 30, and Sched. III.; the M. S. Act, 1876, s. 39, and Appendix, "Forms," No. 55. The power to detain unsafe ships, which applies to all British ships and certain foreign ships, has already been noticed, *ante*, pp. 30—37.

(*g*) See the M. S. Act, 1876, s. 18; and *ante*, p. 709.

(*h*) The M. S. Act, 1876, s. 19.

of final discharge, unless all the passengers have voluntarily quitted the ship before that time (*i*).

By sects. 24 and 25 of this act, in all "emigrant passenger Hospital, &c. ships" a sufficient space must be set apart for a hospital (*k*); and privies, varying in number with the number of the passengers, must be fitted up on each side of the ship.

By sect. 26, no "emigrant passenger ship" can clear out or proceed to sea without such provision for affording light and air Supply of light and air. to the passenger decks as the emigration officer may require. If there are a hundred passengers on board, a proper ventilating apparatus must be carried. The passengers must be allowed to have the free and unimpeded use of the hatchways situated over their portion of the ship, and over each hatchway a booby hatch must be erected, or such other covering as may, in the opinion of the emigration officer, afford the greatest amount of light, air, and protection from wet.

The following are the regulations of the Passengers Act, 1855, Regulations as to boats, life-buoys, &c. as to the carrying by emigrant passenger ships of boats, life-buoys, anchors and fire engines (*l*):—

By sect. 27, every "emigrant passenger ship" must carry throughout the voyage boats according to the following scale:—

- Two boats for every ship of less than 200 tons;
- Three boats for every ship of 200 and less than 400 tons;
- Four boats for every ship of 400 and less than 600 tons;
- Five boats for every ship of 600 and less than 1,000 tons;
- Six boats for every ship of 1,000 and less than 1,500 tons;
- Seven boats for every ship of 1,500 tons and upwards. No

"emigrant passenger ship," however, is required to carry a greater number of boats than are sufficient, in the judgment of the emigration officer at the port of clearance, to carry all the persons on board of the ship (*m*).

(i) No part of any berth may be placed within nine inches of any water-closet erected in the between-decks; see s. 21 of the Passengers Act, 1855.

(k) This space must be under the poop, or in the round-house, or a deck-house, or on the upper passenger deck. It must also be supplied with proper beds, bedding, and utensils; see s. 24. Where as many as fifty female passengers are carried there must be two

water-closets under the poop, or on the upper deck; see s. 25.

(l) See *ante*, pp. 699, 700, as to the requirements of the M. S. Act, 1854, on this subject.

(m) The boat scale sanctioned by the Board of Trade will be found in the Appendix "Forms," No. 33, p. ccccxxviii, and see also the M. S. Act, 1876, s. 20 (*supra*, p. 722).

By the same section, one of these boats must be a long boat and one must be properly fitted as a life-boat. They must be of a suitable size and description, to be approved of by the emigration officer at the port of clearance. They must be seaworthy, properly supplied with all requisites, and kept clear for immediate use. Every "emigrant passenger ship" proceeding southward of the equator must carry two chronometers, and at least one if proceeding northward of the equator. There must be also on board of all "emigrant passenger ships" three steering compasses and one azimuth compass, four properly-fitted life-buoys, some adequate means for making night and fog signals, a fire-engine, and not less than three bower anchors with cables, to be approved of by the emigration officer. Every "emigrant passenger ship" must also be provided to the satisfaction of the Board of Trade with means of making the distress signals specified in the first schedule to the Merchant Shipping Act, 1873, or in any rules substituted therefor, and with a proper supply of lights unextinguishable in water, and fitted for attachment to life-buoys (o).

Articles the
carriage of
which is pro-
hibited.

It was provided by sect. 29 of the Passengers Act, 1855, that no emigrant passenger ship should be allowed to clear out or proceed to sea with any horses, cattle, gunpowder, vitriol, lucifer matches, guano, or green hides on board, as cargo, or with any other article on board, whether as cargo or ballast, which was deemed by the emigration officer at the port of clearance likely to endanger the health or lives of the passengers, or the safety of the ship. It was also provided by that section that no part of the cargo or stores, or of the passengers' luggage, should be carried on the upper deck, or on the passengers' decks, unless in the opinion of the emigration officer it was so placed as not to impede the light or the ventilation, or to interfere with the comfort of the passengers; nor unless it was stowed to his satisfaction (p).

(o) The M. S. Act, 1876, s. 21, and *supra*, p. 702. The section uses the words "emigrant ship," but emigrant ship when used in the M. S. Act, 1876, is defined by sect. 14 of the act to mean a "passenger ship" within the meaning of the Passengers Act, 1855, that is, an emigrant passenger ship.

(p) By the same section, the space so occupied is (unless occupied by pas-

sengers' luggage) to be excluded in calculating the space by which the number of passengers is regulated. Before the passing of the Passengers Act, 1852, no part of the cargo could be stowed in the between-decks. But it was found when the cargo consisted of heavy articles, that inconvenience and danger resulted from its being compulsory to stow the whole of it below.

These provisions have, however, been modified as to horses and cattle by the Passengers Act, 1863. That act provides by sect. 8, that, notwithstanding the prohibition contained in the earlier act in this respect, horses and cattle may be carried as cargo in "emigrant passenger ships," subject to the following conditions:—

- (1.) The animals may not be carried on any deck below the deck on which passengers are berthed, nor in any compartment in which passengers are berthed, nor in any adjoining compartment, except in ships built of iron, and of which the compartments are divided off by water-tight bulkheads extending to the upper deck.
- (2.) Clear space on the spar or weather deck must be left for the use and exercise of the passengers, at the rate of at least ten superficial feet for each statute adult.
- (3.) No greater number of passengers may be carried than in the proportion of fifteen to every one hundred tons of the registered tonnage.
- (4.) In emigrant passenger ships of less than five hundred tons registered tonnage not more than two head of large cattle may be carried, nor in emigrant passenger ships of larger tonnage more than one additional head of such cattle for every additional two hundred tons of the ship's registered tonnage, nor may more in all be carried in any emigrant passenger ship than ten head of such cattle (*q*).
- (5.) Proper arrangements must be made, to the satisfaction of the emigration officer at the port of clearance, for the housing, maintenance, and cleanliness of the animals, and for the stowage of the fodder.
- (6.) Not more than six dogs, and no pigs or male goats, may be conveyed as cargo in any emigrant passenger ship.

Conditions under which horses and cattle may be carried.

The Act of 1855 has also been amended by the Passengers Act, 1870; by sect. 3 of which any one of her Majesty's Secretaries of State may, by order under his hand, authorize the

Carriage of naval and military stores.

See *ante*, p. 697, where the provisions of the M. S. Act, 1873, and of the Explosive Substances Act and the Petroleum Acts, as to the carrying of dangerous goods, are noticed.

(*q*) The term "large cattle" include both sexes of horned cattle, deer, horses and asses. Four sheep of either sex, or

four female goats, are equivalent to and may be carried in lieu of one head of large cattle. For any breach of the regulations contained in this section, the owner, charterer and master are liable to a penalty not exceeding 100*l*. and not less than 5*l*.

carriage as cargo in any "emigrant passenger ship" (subject to such conditions and directions as may be specified in the order) of naval and military stores for the public service. The order must be addressed to the emigration officer at the port of clearance, be countersigned by him, and be delivered to the master of the emigrant passenger ship to which it refers, and by him to the chief officer of customs at the port where the stores are discharged (*r*).

Supply of
food and
water.

By sects. 31, 33, 34 and 35 of the Passengers Act, 1855, it is provided, that in every "emigrant passenger ship" sweet and wholesome provisions and pure water, in proper casks, must be properly stowed on board in sufficient quantities to allow during the whole of the voyage of a regular supply which is fixed by the act (*s*). By sect. 30, the length in time at which different voyages are to be computed, for the purposes of the act, is also fixed (*t*); and by sect. 50, any "emigrant passenger ship" putting back after having been to sea, or being detained in port more than seven days after clearance, must renew this supply (*u*).

It is provided by sect. 34 of this act, that where "emigrant passenger ships" are intended to call at a place in the course of the voyage for the purpose of watering, and the voyage is thus to be performed in portions, and an engagement to that effect is inserted in the bond, to be given to the crown, as hereinafter mentioned (*v*), it is allowable to carry a supply of water sufficient only for the computed length of the voyage to that place. Regulations are contained in the statute to secure the actual

(*r*) 33 & 34 Vict. c. 95, s. 3, Appendix, p. cccxi.

(*s*) The directions as to the size and description of the casks to be passed by the emigration officers, which have been issued by the emigration commissioners, will be found in the Appendix, "Forms," No. 35, p. cccxxx.

(*t*) The Board of Trade are empowered to alter this table from time to time. See the Passengers Act, 1855, s. 30, and the M. S. Act, 1872, s. 5. The Emigration Commissioners issued, under the provisions of the 30th section of the former act, a notice which is still in force, dated 4th June, 1864 (published in the London Gazette of the 7th June), reducing, by eight days, the length of voyage to North

America for steamers capable of steaming at a rate of not less than ten statute miles an hour. The declared voyage, therefore, now is, for steamers clearing between the 16th January and 14th October, inclusive, thirty-two days; and between the 15th October and 15th January, inclusive, thirty-seven days. See Appendix, p. clxxxviii, note (*h*). The computed lengths of the voyages are different with respect to sailing vessels and vessels propelled by steam engines of a certain power.

(*u*) See, as to the certificate of clearance required in such case, s. 50, and the M. S. Act, 1876, s. 14, and *infra*, p. 731.

(*v*) See *infra*, p. 730.

calling of the vessel at the place intended, and water casks must be carried which are sufficient to contain the quantity of water required for the longest portion of the voyage.

By sect. 31, the provisions and water must be approved of by the emigration officers, who must also ascertain that there is on board an ample supply of wholesome provisions and pure water for the victualling of the crew, and of the other persons, not passengers, who are carried in the ship. These officers may reject and mark provisions and water not of a good quality or condition, and may direct the stores to be re-landed and the water emptied (*w*).

By sects. 31 and 32, if a clearance is obtained for any "emigrant passenger ship" not properly stored, or if rejected provisions are re-shipped in the same or any other "emigrant passenger ship," heavy penalties are incurred.

By sect. 59, the Queen may by Order in Council prescribe rules and regulations for permitting the use on board of "emigrant passenger ships" of an apparatus for distilling water, and for defining in such cases the quantity of fresh water to be carried in tanks or casks for the passengers (*x*).

Water
distilling ap-
paratus.

By sect. 28 of this act, it is provided, that every emigrant passenger ship must be manned with an efficient crew for the intended voyage, to the satisfaction of the officer from whom a clearance is demanded. The strength of the crew must not be diminished or any of the men changed when once passed by the officer, without his consent in writing or that of the mercantile marine office superintendent (*y*).

Complement
of emigrant
passenger
ships.

By sects. 38 and 39 of this act, in every "emigrant passenger

Passengers'
steward and
cook.

(*w*) By s. 102 of the act, similar issues of pure water and good provisions must be made by the master of every "ship" bringing passengers into the United Kingdom from any place out of Europe. See *supra*, p. 718. The provisions are tested by the arbitrary selection of some of the barrels, which are bored through with an auger, so that a fair sample may be brought up and tasted. The statute requires, for the purpose of preventing fraud or mistake, that the stores which are on board for the crew, and which consist of articles of a like description to those which are to be furnished to the passengers, should not be inferior

to them in quality. See s. 31.

(*x*) See an Order in Council for this purpose, dated 28 June, 1875, Appendix, "Orders in Council," p. 64. As to the necessity of carrying a certificated master and certificated officers, see *supra*, p. 702.

(*y*) By the same section an appeal in writing to the Board of Trade is given to the owner or charterer against the decision of the emigration officer in this respect. The Board may then appoint (at the expense of the appellant) two other officers or persons to examine into the matter, and their decision is conclusive.

ship" carrying as many as one hundred passengers, there must be a passengers' steward and a passengers' cook on board, who must be rated on the ship's articles as such, and must be approved of by the emigration officers. There must be two cooks if the number of statute adults exceeds three hundred. They must be seafaring men. A convenient place for cooking must be set apart on deck, and a sufficient cooking apparatus, properly covered in and arranged with a proper supply of fuel, must also be provided.

Interpreters.

By sect. 40, in all foreign "emigrant passenger ships," in which one-half of the passengers are British and the number of passengers does not exceed two hundred and fifty, one interpreter must be carried who understands and speaks intelligibly both English and the language spoken by the master and crew. There must be two interpreters where this number of passengers is exceeded. These provisions do not apply where the master and officers, or not less than three of them, understand English and speak it intelligibly (z).

Medical officer.

By sect. 41 of the Passengers Act, 1855, every "emigrant passenger ship" must carry a duly qualified medical practitioner (rated on the articles) in the following cases:—

- (1.) When the duration of the voyage is to exceed eighty days in the case of sailing vessels, and forty-five days in that of steamers, and the passengers on board exceed fifty.
- (2.) When the number of persons on board (including cabin passengers, officers and crew) exceeds three hundred (a).

(z) The stewards and interpreters must be employed exclusively in attendance upon the passengers, and may not assist in working the ship. The Passengers Act, 1855, ss. 38, 40.

(a) Under an Order in Council made under the 59th section of the Passengers Act, 1855 (see *infra*, p. 732), a medical officer is to be carried on board every emigrant passenger ship carrying more than fifty passengers. See Appendix, "Orders in Council," p. 64. See also the M. S. Act, 1854, s. 230, and *supra*, p. 207. By s. 42 of the Passengers Act, 1855, no medical man is duly qualified, within the meaning of that act, unless he is entitled to practise as a physician, surgeon or apothecary in some part of her Majesty's dominions, or (in the case

of foreign ships) in the country to which the ship belongs; nor, unless his name shall have been notified to the emigration officer at the port of clearance, and shall not have been objected to; nor, unless he is provided with proper surgical instruments, to the satisfaction of the officer. Where, however, the majority of the passengers in any "emigrant passenger ship" (or as many as three hundred) are foreigners, any medical practitioner approved of by the emigration officer may be carried. The Passengers Act, 1855, s. 42. In the case of "emigrant passenger ships" sailing from any British possession, the governor of such possession may authorize any competent person to act as medical practitioner on board any emigrant passenger ship pro-

Another requisite before any "emigrant passenger ship" may clear out or proceed to sea is the medical inspection of the passengers and crew, and of the medicines and medical stores on board.

Medical inspection of passengers and crew and medical stores.

The owner or charterer is bound by sect. 43 of the Passengers Act, 1855, to provide an adequate supply of medicines, medical comforts, instruments, and disinfecting fluid or agent for the intended voyage (*b*); and by sect. 44, before the clearance the emigration officer must, if it be possible, cause an inspection to be made of these medicines and other matters, and also of all the passengers and crew, by a medical practitioner appointed by him (*c*).

By sect. 45 of the Passengers Act, 1855, if the emigration officer is satisfied that any person on board or about to proceed on board is by reason of sickness unfit to proceed, or is for any reason likely to endanger the health or safety of the other persons on board, he may prohibit the embarkation, or require the person in question to be re-landed. The officer may also, if he deem it necessary, require all or any of the passengers to be re-landed for the purification of the ship or otherwise. The observance of these provisions is enforced by heavy penalties (*d*). By sect. 46, passengers so re-landed and who are not afterwards re-embarked may recover summarily all the passage money which they have paid from the person to whom it has been paid, or from either the owner, charterer, or master, at their option, or at that of the emigration officer. By sect. 47, the master is bound, in these cases, to find subsistence money for every statute adult at the rate of 1s. 6d. a day until the passengers are re-embarked, or decline, or neglect to proceed, or their passage money is returned.

Landing of sick passengers.

By sect. 11 of the Passengers Act, 1863, the provisions of sect. 46 of the Passengers Act, 1855, are extended to cabin passengers landed on account of sickness, and it is provided that the passage money of all passengers so landed may be recovered

ceeding on a colonial voyage within the act. The Passengers Act, 1855, s. 98. The Medical Act, 1858 (21 & 22 Vict. c. 90), s. 36, prohibits any person not qualified as required by that act holding any appointment as a medical officer on emigrant or other vessels, but provides that nothing in that act shall extend to alter or repeal any of the provisions of the Passengers Act, 1855. See *ante*, p. 207, note (*g*).

(*b*) For the scales of medicines and medical stores authorized under this

section see Appendix, "Forms," Nos. 36, 37, pp. cccxxxix, cccxxxiv.

(*c*) See also sect. 50 as to the certificate of clearance required where ships are detained in port or put back to intermediate ports. See also the M. S. Act, 1876, s. 14.

(*d*) When any persons are re-landed under these provisions, any members of the family who cannot be properly separated from these persons must also be re-landed. The Passengers Act, s. 45.

in the manner pointed out by the last-mentioned act, upon the delivery up of their contract tickets, and notwithstanding the ship may not have sailed; in the case of cabin passengers, however, only one-half of the passage money is recoverable.

Execution
of bond to
Crown.

Before any "emigrant passenger ship" can clear out or proceed to sea it is necessary (by sects. 11 and 63 of the Passengers Act, 1855) that a bond to the Crown in the sum of 2,000*l.* should be entered into by the master, together with the owner or charterer (or in the absence of the owner or charterer, or if the master is the owner or charterer, together with a surety) to secure obedience to the act, and to all orders and regulations made in order to carry it into execution. This bond must also be conditioned that the ship is in all respects seaworthy, and that all penalties incurred under the act shall be duly paid; and where the ship is a foreign one proceeding to any of the British possessions abroad, a statement must be inserted in the condition of the bond that the master will submit himself, as if he were a British subject, to the British tribunals abroad having power to adjudicate on offences committed against the act. By sect. 17 of the Passengers Act, 1863, it is provided, that in the case of "emigrant passenger ships" of which neither the owners nor the charterers reside in the United Kingdom the bond must be for the sum of 5,000*l.*, and must contain an additional condition that the obligors shall be liable to the Crown for all expenses incurred under the Passengers Acts in rescuing, maintaining, or forwarding to their destination passengers who by reason of shipwreck, or any other cause except their own neglect or default, are not conveyed to their intended destination by the owners or charterers (*d*).

Provision
where owners
reside abroad.

In order to facilitate the enforcement of these bonds in the British colonies, in the case of "emigrant passenger ships" proceeding to the Queen's possessions abroad, it is provided by sect. 64 of the Passengers Act, 1855, that counterparts of them may be certified by the chief officers of customs at the ports of clearance, and sent to the colony, where they are receivable in evidence without further proof of their execution (*e*).

(*d*) See as to the form of these bonds, Appendix, No. 34, p. cccxxiii. They must be executed in duplicate, and are not liable to stamp duty; see s. 63 of the Passengers Act, 1855. In the absence of any agreement to the contrary, the owner is the person ultimately liable in respect of any default in complying with the regulations of the act.

See s. 65.

(*e*) These bonds cannot be sued on in the colony after the expiration of three months from the arrival of the ship there, nor in the United Kingdom after twelve months from the return of the ship and master. The Passengers Act, 1855, s. 64.

By sect. 11 of the Passengers Act, 1855, no ship fitted or intended for the carriage of passengers as an "emigrant passenger ship" can clear out or proceed to sea without a certificate (*f*) from the emigration officer at the port of clearance that the requirements of the act have been complied with, and that the ship is seaworthy, in safe trim, and in all respects fit for the voyage, and that the passengers and crew are in a fit state to proceed, nor until the master has joined in executing a bond to the Crown, as above mentioned (*g*). A corresponding certificate must be given if the ship is detained in port more than seven days, or after sailing puts into an intermediate port (*h*).

Grant of
certificate of
clearance.

By the 14th section of the M. S. Act, 1876, an appeal against the refusal of either of these certificates is given to the Court of Survey of the port or district where the ship for the time being is (*i*).

By sect. 13 of the Passengers Act, 1863, if any "emigrant passenger ship" clears out or proceeds to sea without the master's having first obtained the certificate of clearance, or having joined in the bond above mentioned, or if any such ship, after having put to sea, puts into any port or place in the United Kingdom, and leaves or attempts to leave it with passengers on board without having obtained the certificate of clearance necessary in such a case, the ship is forfeited to the Crown; and in these cases the ship may be seized by any officer of customs if found within two years from the commission of the offence in any part of the Queen's dominions (*k*).

(*f*) The form of the certificate now in use is printed in the Appendix, "Forms," No. 31, p. ccccxix.

(*g*) This section gives to the owner or charterer a power of appealing to the Board of Trade against a refusal to grant this certificate.

The stringent provision whereby no emigrant passenger is allowed to clear without a clearance certificate, was introduced for the first time by the Passengers Act, 1852. Its object was to put a stop to a practice, of which there had been recent instances, of foreign vessels proceeding to sea without a clearance when required to comply with the regulations of the emigration officers. Under the earlier system there was no adequate punishment in these cases, for if a bond had been given by the master, it could only be enforced against him personally, and this remedy was of no effect if the ship was sent back to England

with a different master. As to the power given to her Majesty by Order in Council to prohibit emigration from any port where an epidemic disease exists, see the Passengers Act, 1855, s. 59, and *infra*, p. 733.

(*h*) A fresh certificate is required when any additional passenger is taken on board after the passenger lists have been delivered. The Passengers Act, 1855, s. 17. See the Passengers Act, 1855, s. 50. See also *supra*, pp. 722, note (*f*), 726.

(*i*) No appeal, however, is allowed where the person appointed to make the survey for the purpose of the certificate which has been refused has, on a requisition by the owner, been accompanied on the survey by some person appointed by the owner, and such two persons have agreed on the survey. See the M. S. Act, 1876, s. 14, and *ante*, pp. 706, 707.

(*k*) This section is substituted for

No action will lie against an emigration officer who in the exercise of a *bonâ fide* discretion refuses to give a clearance certificate, under the belief that the vessel is so deeply laden as to endanger the ship and passengers, although none of the articles taken on board are prohibited by the Passengers Acts (*l*).

Provisions relating to emigrant ships after clearance.

The Passengers Act, 1855, contains also numerous provisions for promoting the safety, comfort, and health of the passengers of emigrant passenger ships during the voyage. Some of these provisions have been modified by the Passengers Act, 1863, and they are shortly as follows:—

Equipment during the voyage.

The statutory regulations as to the boats which every emigrant passenger ship must carry, and the manner in which she must be equipped in other respects, have already been mentioned (*m*).

Regulations for preserving order, &c. under Orders in Council.

By sect. 59 of the Passengers Act, 1855, the Queen in Council is empowered to make regulations for the following purposes:—

- (1.) For preserving order, promoting health and securing cleanliness and ventilation on board of "emigrant passenger ships" proceeding from the United Kingdom to any port or place in the Queen's possessions abroad (*n*).
- (2.) For permitting the use on board of "emigrant passenger ships" of an apparatus for distilling water, and for defining in these cases the quantity of fresh water to be carried in tanks or casks for the passengers (*o*).
- (3.) For prohibiting emigration from any port at any time when choleraic or any epidemic disease may be generally prevalent in the United Kingdom or any part of it, or for reducing the number of passengers allowed to be carried in "emigrant passenger ships" generally, or from any particular ports under the provisions of the act.
- (4.) For requiring duly qualified medical practitioners to be carried in "emigrant passenger ships," in cases where

s. 12 of the Passengers Act, 1855, which is repealed by the Passengers Act, 1863, s. 12. See also s. 50 of the Passengers Act, 1855. The ship may be released by an order from the Board of Trade, on payment of any sum not exceeding 2,000*l.*, which the board may specify in writing. The Passengers Act, 1863, s. 13, and the M. S. Act, 1872, s. 7.

(*l*) *Steel v. Schomberg*, 4 E. & B. 620, which was a decision upon the Passengers Act, 1852.

(*m*) See *supra*, p. 723.

(*n*) The Orders in Council now in

force relating to this subject, which were issued on the 3rd of February, 1863, and the 7th January, 1864, will be found in the Appendix, pp. 60—63. The former of these Orders in Council only applies to emigrant passenger ships proceeding to Victoria, and having on board more than ten unprotected female passengers. Before the passing of the Passengers Act, 1855, an Order in Council, dated the 16th October, 1852, was in force under the Passengers Act, 1852.

(*o*) See *supra*, p. 727, note (*z*).

they would not be required to be carried under the provisions of the act (*p*).

By sects. 60 and 61 of the Passengers Act, 1855, the medical practitioner on board (aided by the master), or the master alone, if there is no medical man on board, is bound to exact obedience to all such regulations as may be prescribed under the powers of the last-mentioned section to be observed on board emigrant passenger ships. Abstracts of the act and of the regulations must be posted up on board, and any infringement of them, or obstruction to their execution, and any riotous or insubordinate conduct, or offence against any of the provisions of the act, may be punished by fine and imprisonment on a conviction before two justices. Any person defacing or displacing the abstracts is also liable to a fine (*q*).

By sect. 35 of the Passengers Act, 1855, a fixed supply of water and provisions must be furnished by the master of every "emigrant passenger ship" to the passengers during the voyage, and during any detention in its course. The water must be issued daily, at the rate of three quarts a day to each statute adult, exclusive of the quantity necessary for cooking articles issued in a cooked state. Issue of provisions and water.

The weekly scale of provisions for each statute adult, as laid down in this act, is as follows:— Dietary scales.

	For Voyages not exceeding 84 Days for Sailing Vessels, or 60 Days for Steamers.	For Voyages exceeding 84 Days for Sailing Vessels, or 60 Days for Steamers.
	lbs. oz.	lbs. oz.
Bread or biscuit, not inferior in quality to navy biscuit	3 8	3 8
Wheaten flour	1 0	2 0
Oatmeal	1 8	1 0
Rice	1 8	0 8
Peas	1 8	1 8
Potatoes	2 0	2 0
Beef	1 4	1 4
Pork	1 0	1 0
Tea	0 2	0 2
Sugar	1 0	1 0
Salt	0 2	0 2

(*p*) See *supra*, p. 728, note (*a*).

(*q*) As to how far these provisions as to keeping on board a copy of the act apply to ships on colonial voyages, see the Passengers Act, 1855, s. 96.

these provisions must now be read with the enactments as to lime juice contained in the Merchant Shipping Act, 1867 (*m*).

And by sect. 10 of the Passengers Act, 1863, it is provided that in addition to the substitutions which are allowed in the dietary scales and which are mentioned above, soft bread baked on board may, at the option of the master, be issued in lieu of the following articles in the following proportions:—

1½ lb. of soft bread may be issued in lieu of 1 lb. of flour, or of 1 lb. of biscuit, or of 1½ lb. of oatmeal, or of 1 lb. of rice, or of 1 lb. of peas.

By sect. 37 of the Passengers Act, 1855 (as amended by sect. 5 of the M. S. Act, 1872), these dietary scales may be varied from time to time by the Board of Trade (*n*), so long as an equivalent amount of wholesome nutriment is secured (*o*).

The provisions must be issued (such of them as require cooking being properly cooked) daily before two in the afternoon, and the first issue must be made on the day of embarkation (*p*). When the passengers are divided into messes the provisions must be issued to the head man of the mess (*q*). These messes are not (by sect. 36 of the Passengers Act, 1855) to consist of more than ten statute adults in each; and the members of the same family are (if it includes a male adult) to be allowed to mess separately.

By sect. 62 of the Passengers Act, 1855, no person in any "emigrant passenger ship" may directly or indirectly sell any spirits or strong waters during the voyage to any passenger. Prohibition of sale of spirits.

We have already seen that, by sect. 43, a proper supply of surgical instruments, medicines and disinfecting fluid, approved of by the emigration officers, must be also kept on board (*r*).

(*m*) See *supra*, pp. 205, 206; and as to the quality of the lime juice, see *supra*, p. 205.

(*n*) By the Passengers Act, 1855, this duty was performed by Emigration Commissioners. It is transferred to the Board of Trade by s. 5 of the M. S. Act, 1872. See also the M. S. Act, 1876, s. 20 (*supra*, p. 722).

(*o*) The Emigration Commissioners in April, 1856, issued a notice under the provisions of this section authorizing in certain specified cases the issue of provision according to a scale differing from that mentioned above. See Appendix, p. cxc, note (*s*).

(*p*) Before the passing of the Passengers by Sea Act, 1852, there was no statutory regulation requiring that the food should be issued cooked. It was usually issued in this state on the Australian but not on the American passages. When the weather was bad, great confusion, privation, and waste resulted from the food being issued uncooked.

(*q*) The Passengers Act, 1855, s. 35.

(*r*) See *supra*, p. 729. The lists of surgical instruments and medicines issued by the Board of Trade will be found in the Appendix, "Forms," Nos. 36, 37, pp. cccxxxi, cccxxxiv.

Forwarding passengers in cases of wreck, and rights of passengers in such cases.

Provisions were contained in sects. 51, 53 and 54 of the Passengers Act, 1855, with reference to the forwarding of the passengers of emigrant passenger ships in cases of wreck, and to their maintenance in the meantime; and also with reference to passengers landed at places other than those at which they had contracted to land. These sections have, however, been repealed by sect. 12 of the Passengers Act, 1863, and the following provisions have been substituted by that act in lieu of them.

Where passengers brought back to United Kingdom.

By sect. 14 of the Passengers Act, 1863, if any "emigrant passenger ship" is wrecked or rendered otherwise unfit to proceed on her intended voyage while in any port of the United Kingdom, or after the commencement of the voyage, and if the passengers or any of them are brought back to the United Kingdom, the master, charterer, or owner, must, within forty-eight hours, give a written undertaking to the following effect (*r*).

If the ship has been wrecked or rendered unfit to proceed, the undertaking must be that the owner, charterer, or master, will embark and convey the passengers in some other eligible ship to sail, within six weeks from that date, to the place for which their passage has been taken.

If the ship has put into port in a damaged state, the undertaking must be that she shall be made seaworthy and fit in all respects for the intended voyage, and shall within six weeks from that date sail again with her passengers.

By the same section, in either of the above cases the owner, charterer, or master must until the passengers proceed on their voyage, either lodge and maintain them on board in the same manner as if they were at sea, or pay to them subsistence money after the rate of 1s. 6d. a day for each statute adult, unless they are maintained in any hulk or establishment under the superintendence of the emigration commissioners, in which case the subsistence money must be paid to the emigration officer. If the substituted ship or damaged ship does not sail within the time prescribed, or if default is made in any of the requirements of this section, the passengers, or any emigration officer on their behalf, may recover, by summary process, (in the manner provided in the Passengers Act, 1855) all their passage money from the person to whom or on whose account it

(*r*) The undertaking must be given to the nearest emigration officer, or in his absence to the chief officer of customs. The Passenger Act, 1863, s. 14.

has been paid, or from the owner, charterer, or master at the option of the passengers or of the emigration officer (s).

By sect. 15 of the Passengers Act, 1863, if any passengers or cabin passengers of any "emigrant passenger ship" find themselves, without neglect or fault of their own, at a colonial or foreign place other than that for which the ship was originally bound, or at which they have (or the Board of Trade or any public officer or other person on their behalf has) contracted that they shall be landed, the British local authorities may forward them to their destination, unless the master, within forty-eight hours of their arrival, gives a written undertaking to forward them or carry them to it within six weeks and performs this undertaking (t). By sect. 16, passengers who are forwarded under these circumstances are not, however, entitled to the return of their passage money, or to compensation for their loss of passage under the provisions of the earlier act.

Where passengers found abroad elsewhere than at destination.

By sect. 52 of the Passengers Act, 1855, it is provided that if the passengers or cabin passengers of any "emigrant passenger ship" are taken off from the ship, or picked up at sea from any boat, raft or otherwise, the expense thereby incurred may be defrayed by one of the secretaries of state, if they are conveyed to any place in the United Kingdom, or by the governor of the colony, or consular officer, if they are landed in any English colony, or in a foreign country.

Where passengers shipwrecked.

By sect. 16 of the Passengers Act, 1863, the expenses incurred by the British authorities in the cases provided for by sect. 15 of that act, and by sect. 52 of the Passengers Act, 1855, including the expenses of maintaining the passengers until they are forwarded, and the cost of necessary bedding, provisions, and stores, become a debt to the Crown from the owner, charterer and master, and they are recoverable from them, or any of them, in the same way as an ordinary Crown debt (u). No greater sum can, however, be recovered

How expenses of forwarding distressed passengers met.

(s) See the Passengers Act, 1855, ss. 84—91. In these cases the emigration officers may, if they think it necessary, direct that the passengers shall be removed from the ship at the expense of the master. Any passenger refusing to leave the ship after this direction is liable to a penalty or to imprisonment not exceeding one month. The Passengers Act, 1863, s. 14.

(t) The undertaking must be given to the governor of the colony, or to the consular officer on the spot. The Passengers Act, 1863, s. 16.

(u) It is provided by the same section, that a certificate in a form given in the schedule to the act (see Appendix, p. ccxlviii), and signed by the secretary of state, governor, or consular officer, stating the amount of these expenses, shall be receivable in

than twice the total amount of passage money received or due to and recoverable by the owner, charterer or master, on account of the whole number of passengers and cabin passengers embarked in the ship; which amount must be proved by the defendant if he claims the advantage of this limitation (x).

Insurances in respect of passages not invalid.

By sect. 55 of the Passengers Act, 1855, no insurance effected in respect of any passages, or of any passage or compensation money, by any one made liable, in the events mentioned above, to provide the passages or pay the money, or in respect of any other risk under the act, is invalid by reason of the nature of the risk or interest.

Maintenance of passengers after end of voyage.

By sect. 57 of the Passengers Act, 1855, every passenger in an "emigrant passenger ship" is entitled at the end of his voyage to sleep and be maintained on board for forty-eight hours, unless the ship proceeds sooner on her further voyage.

Penalty on stowaways in emigrant passenger ships.

The 18th sect. of the Passengers Act, 1855, as amended by the 7th sect. of the Passengers Act, 1863, provides that if any person shall be found on board any emigrant passenger ship with intent to obtain a passage therein without the consent of the owner, master or charterer thereof, such person and every person aiding and abetting him in such fraudulent intent shall be liable to a penalty of 20*l.* or to imprisonment not exceeding three months. The former of these sections also provides that any such person so found on board may be taken without warrant before a justice, who may summarily hear the case, and, on proof of the offence, convict the offender (y).

evidence, and be deemed sufficient evidence of the amount unless the defendant pleads and proves that it is false or fraudulent, or pleads and proves facts showing that the expenses were not duly incurred under the provisions of these statutes.

(x) The Passengers Act, 1863, s. 16.

(y) See also the M. S. Act, 1854,

s. 258, which provides that any person who secretes himself and goes to sea in *any ship* without the consent of either the owner, consignee, or master, or of any person in charge of the ship or entitled to give such consent, shall be liable to a penalty of not exceeding 20*l.*, or to imprisonment.

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LONDON:
PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS,
CHANCERY LANE.

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